Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1999

THOMAS LUCIDORE,

Petitioner,

vs.

NEW YORK STATE DIVISION OF PAROLE,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. What showing of "actual innocence" entitles a petitioner to an exception to the one-year statute of limitations to §2254 habeas corpus petitions created by the Antiterrorism and Effective Death Penalty Act of 1996?

2. Does the one-year statute of limitations created by the Antiterrorism and Effective Death Penalty Act of 1996 violate the Eighth Amendment, the Due Process Clauses of the Fifth and Fourteenth Amendments, or the Suspension Clause. The Court of Appeals answered this question in the negative.

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OPINION BELOW

The opinion of the United States District Court for the Southern District of New York (Andrew J. Peck, U.S.M.J.) is unreported and is included in the Appendix at pages A18 to A41. The opinion of the United States Court of Appeals for the Second Circuit is unreported and is included in the Appendix at pages A3 to A17.

JURISDICTION

Jurisdiction in the district court was predicated on 28 U.S.C. §2241 and §2254. The district court granted a certificate of appealability pursuant to 28 U.S.C. §2253(c)(2) and appellate jurisdiction in the Court of Appeals was predicated on 28 U.S.C. §2253(c)(1). Jurisdiction in this Court is predicated upon 28 U.S.C. §1254(1).

The decision and order of the Court of Appeals was issued on April 6, 2000. Petitioner has not requested an extension of time for filing this Petition.

STATEMENT OF COMPLIANCE WITH RULE 29.4

In compliance with Rule 29.4(b), because 28 U.S.C. §2403(a) may apply and because neither the United States nor any federal department, office, agency, officer or employee is a party, a copy of this Petition for Certiorari has been served upon the Solicitor General of the United States at Room 5614, Department of Justice, 950 Pennsylvania Avenue, N.W., Washington, D.C. 20530-0001. The United States Court of Appeals for the Second Circuit did not certify to the Attorney General that the constitutionality of an Act of Congress was drawn into question.

STATUTES AND CONSTITUTIONAL PROVISIONS

Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. §2241(d)(1) is reproduced in the Appendix at Page A42.

Suspension Clause, U.S. Constitution, Article I, § 9 is reproduced in the Appendix at Page A43.

Due Process Clause, U.S. Constitution, Amendment V is reproduced in the Appendix at Page A43.

Due Process Clause, U.S. Constitution, Amendment XIV is reproduced in the Appendix at Page A43.

U.S. Constitution, Amendment VIII is reproduced in the Appendix at Page A43.

STATEMENT OF THE CASE

Introduction

In 1993, Thomas Lucidore and Megan Travers both worked for Mitsubishi International: Mr. Lucidore in Pittsburgh, and Ms. Travers in New York City. (A-155)[1]. On February 18, 1993, Mr. Lucidore was in New York on company business, and Ms. Travers asked him to have dinner with her. (A-155-156). All agree that the couple went to dinner and consumed some alcoholic beverages, that Ms. Travers accompanied Mr. Lucidore to his room at the Omni-Berkshire Hotel, that some sort of sexual encounter between the two took place in the early hours of the morning of February 19, 1993, and that Mr. Lucidore walked Ms. Travers to the lobby of the hotel afterwards and waited with her until a car service took her home to Clarkstown, New York. (A-157-158). However, different accounts have been given as to the details of the evening, and those details form the crux of this case.

Mr. Lucidore's Account

With the aid of his credit card receipts, Tom Lucidore recalled that he consumed twelve beers and two liquor drinks, and that Ms. Travers consumed nine beers over the course of the evening. (A-156). Later in the evening, the couple was holding hands, and Ms. Travers had her head on Tom's

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[1] All Citations in the form (A-*page*) refer to the Appendix in the Court of Appeals. References in the form A*page*, *infra*, refer to the Appendix to this Petition.

shoulder. (A-156-157). She asked to come up to his hotel room. (A-157). Once in the room, Ms. Travers retired to the bathroom. (A-157). When she emerged, Tom used the bathroom himself. (A-157). When he came out of the bathroom, he found Ms. Travers sitting on the bed with her jacket off and her earrings removed. (A-157-158). A consensual sexual encounter followed, during which the couple engaged in some light bondage and Ms. Travers performed fellatio upon Tom Lucidore, and after which Tom called the front desk to arrange for a car service to take Ms. Travers home. (A-94-101).

Ms. Travers' Original Story

On February 19, 1993, prior to six o'clock in the morning, Ms. Travers' brother-in-law, Dr. Richard King, who was vacationing in the Bahamas, began calling Ms. Travers. Dr. King, the police surgeon for the Town of Clarkstown, subsequently contacted the Clarkstown police, claiming that Ms. Travers had been raped. Detective Sergeant Janice Rogan went to Ms. Travers' home to question her about the alleged rape. (A-89-91).

Ms. Travers told Detective Sergeant Rogan that she had only consumed four beers, and had only gone to Tom's hotel room because she did not feel well and needed to use the bathroom. She claimed that when she emerged from the bathroom, Tom began fondling her. She admitted to Detective Sergeant Rogan that she could have left the room at this point, but chose to stay. Travers claimed that Tom then tied her hands, took her to the bed, and tied her up some more. (A-89-91).

Travers said that Tom then performed various abusive sexual acts upon her, but did not have vaginal intercourse with her, and when he showed an interest in touching her anal area, she "talked him out of it." She eventually performed fellatio upon him, after which he untied her and called for a car service. She said that when the car service arrived, he attempted to kiss her goodnight, but that she refused the kiss. (A-89-91).

Detective Sergeant Rogan's Observations

Detective Sergeant Rogan examined Ms. Travers' upper body during the interview. She found marks on Ms. Travers' breasts that appeared to be small bite marks, but that could have

resulted from "lovemaking." In her detailed report of this interview, Detective Sergeant Rogan does not mention observing any other marks or contusions on Ms. Travers' upper body, arms or wrists. (A-90).

Rogan reported that while Ms. Travers' story was believable, she did not think that any charges could result from the allegations. She indicated that Ms. Travers did not wish to pursue charges against Tom Lucidore. (A-90-91).

Immediately after writing the report on February 19, 1993, Rogan faxed a copy of the report to the New York City Police Department. (A-153).

A Call from Dr. King

During the interview with Ms. Travers, Dr. King called. Detective Sergeant Rogan tried to explain to him that Ms. Travers had not been raped. However, Dr. King "had made up his mind" and told Rogan that he would have the case prosecuted himself, despite Ms. Travers' reluctance to go forward with charges. (A-90).

A Phony Medical Report

The following day, Ms. Travers went to the Nyack Hospital for a medical examination, accompanied by Dr. King. This examination was purportedly performed by one Dr. Ibrahim, a colleague of Dr. King.

In a civil deposition conducted in 1996, Ms. Travers described the circumstances of this examination. Dr. Ibrahim did not ask her what had happened, as Dr. King had told him his story, and Ms. Travers did not listen to Dr. King's account. Notably, at no point were her panties removed, and Dr. Ibrahim did not examine her pubic area or vagina. (A-140).

Nonetheless, Dr. Ibrahim reported multiple contusions around her pubic hairline, and tenderness in that area. Furthermore, he reported multiple contusions on her wrists, shoulders and back – contusions that Detective Sergeant Rogan did not report, and that were not reported in the Good Samaritan Emergency Room Record of Ms. Travers' visit to that facility a few days later. (A-136). Compare A-90 and A-142.

Polaroid photographs of Ms. Travers' breasts were taken in New York City on February 20, 1993, but despite the availability of the camera to document the alleged contusions reported by Dr. Ibrahim (but not by Detective Sergeant Rogan), no photographs were taken of Ms. Travers' wrists, shoulders, back or pubic area. (A-151).

On To New York

On February 20, 1993, Dr. King took Ms. Travers to the Special Victims Unit of the New York City Police Department. A Detective Aponte interviewed Ms. Travers. (A-92). During this interview, Ms. Travers told a story that differed markedly from the story that she had told Detective Sergeant Rogan the day before.

In this second version, Ms. Travers sat down on Mr. Lucidore's bed having removed her outer coat and jacket. Mr. Lucidore sat down next to her and ran his hand up her thigh. Later, Mr. Lucidore tied Ms. Travers, and engaged in allegedly nonconsensual sexual relations with her. (A-92-93).

During this interview, Ms. Travers again stated that Tom Lucidore did not engage in sexual intercourse with her at any time during the encounter, and that there was no penis/vagina nor penis/anal contact. She restated that she performed fellatio upon Mr. Lucidore and that she was not tied during the fellatio, and further stated that she put her arms around Tom to make him think that she was enjoying the encounter. (A-92-93).

Following this interview, a female police detective took five photographs of Ms. Travers' breasts. (A-151). The NYPD provided Ms. Travers with a recording device and instructed her to record any telephone conversations that she had with Tom Lucidore. *See* A-102.

A Telephone Conversation

On February 22, 1993, Ms. Travers telephoned Tom Lucidore. During the conversation, she asked Tom: "Why did you have to hurt me?" Mr. Lucidore said that he had "no explanation," and Ms. Travers replied that "I was just curious."

The couple agreed to meet for lunch the next time that Mr. Lucidore was in New York City. At no point during this conversation did Ms. Travers indicate to Mr. Lucidore that anything that took place in the hotel room was not consensual. (A-102).

The Saint Patrick's Day Dinner

Mr. Lucidore and Ms. Travers met for dinner in New York City on Saint Patrick's Day, March 17, 1993. The NYPD fitted Ms. Travers with a recording device and taped the entire dinner conversation. (A-103 *et seq.*) Mr. Lucidore did not know that the police were investigating the incident.

The dinner conversation began with small talk. Despite having been "drinking so much" before meeting Ms. Travers, Mr. Lucidore ordered a beer. (A-113).

Ms. Travers eventually raised the subject of the incident in the hotel room. Mr. Lucidore told Ms. Travers that he had "no good way to explain that whole evening." (A-115). Ms. Travers then accused Tom of having forced her to have sex. (A-116).

During the conversation, Ms. Travers claimed that she had done nothing to indicate that she was interested in having a sexual encounter with Tom. Tom mentioned that she had put her head on his shoulder at O'Grady's. Significantly, Ms. Travers acknowledged that this had taken place. (A-116).

Ms. Travers also claimed that she had only gone back to the hotel room with Tom because she "was going to get sick." She then told Tom that "I went in the bathroom. I got sick. I came out." She then continued to accuse Tom of having attacked her and of having forced her, "without me saying it was okay." (A-117).

During this litany of accusations, Mr. Lucidore could hardly get a word in without interruption. He repeatedly objected with "but ..." and "no" to Ms. Travers as she accused him, but she plowed onward, ignoring his objections. Finally, Mr. Lucidore asked "[w]hy didn't you just leave?" (A-118).

She responded with "[t]here wasn't much time between the time I went up there to be sick and the time everything started happening." She then claimed that she was frightened and launched into her third inconsistent description of the incident. (A-118).

In this version, "[y]ou throw me on the bed so you could take my clothes off, you tied up my hands, ignore everything I say." She next claimed that he "had sex with" her. Asked again why she did not leave, she replied "[o]h sure, I'll just ... I'll just stand up, naked with my hands tied, and just walk out." (A-118). (Ellipses in original).

Mr. Lucidore noted that "You were untied several times." Ms. Travers agreed. Mr. Lucidore continued: "[y]ou were unimpaired each time. Times when we were talking." Ms. Travers once again agreed. (A-119).

Mr. Lucidore then told Ms. Travers: "I did not realize that I had hurt you." (A-119). He continued with "I did not realize ... that I had instilled fear in you. I had no awareness." (A-120). (Ellipses in original). Later, Tom explained that he had apologized to her on the telephone because he was "feeling guilty from the for [sic] adultery," (A-125), or because Ms. Travers missed work the following day due to the lateness of the encounter. (A-126). He then said that "I know...now...that on that night...that hurtful things happened...I did not know that...when we got the car for you that morning."(A-127). (Ellipses in original).

An Arrest and Interrogation

Following this dinner, the New York City Police arrested Mr. Lucidore. After questioning by police, Mr. Lucidore provided the NYPD with a written statement.

In the written statement, Mr. Lucidore indicated that "after dinner at the Princeton Club," at Rosy O'Grady's bar, he and Ms. Travers engaged in "hand holding" and "kissing," and "she sucked my fingers." At the Omni-Berkshire, Ms. Travers asked to come up to his room. Ms. Travers "came out of the bathroom and laid on my bed. I laid down beside her and we began kissing and fondling." Ms. Travers then "took off her dress." (A-94).

Tom "placed her hands behind her back and [he] tied them with [his] tie." He notes that "she did not ask me to do this but I thought it was indicated." (A-94). He "masturbated her," then "untied her." They talked. "I tied her hands again. I masturbated her again." (A-94). "Also I spanked her." (A-94). "I untied her. We talked. I performed oral sex and [illegible] on her. I tied her again, masturbated her, also use a lotion and me [sic] finger and penetrated her anus." (A-94-95).

"Either at this time or later she asked me what I wanted. I asked her for a blow job. I tied her hands again and gagged her and masturbated her again." (A-95). "At this time we discussed how late it was, the fact it would take her so long to go home and come back to work and whether she would miss work or not. Approx. at 5:00 AM, I arrange for a car to take her home." (A-95).

Mr. Lucidore then states that "I learned tonight that Meagan [sic] felt I had restrained her and caused her to have sex with me as described above against her will. I did not believe this was the case at this the [sic] time. I was not my intention to force anything against her will." He does note that "during the fingering of her anus Meagan [sic] told me to stop which I did do." (A-96).

Mr. Lucidore "bought condoms in the event of sex" prior to the March 17 dinner because "I had thought this a possibility because Meagan [sic] had called my [sic] to make a dinner reservation." While Mr. Lucidore felt guilty about his adultery, he "probably wanted to have another affair." (A-99).

Mr. Lucidore closed out his written statement with "at this point I am becoming fatigue [sic] and I can think of nothing more relevant to write." (A-100-101). However, the long night was just beginning for Tom Lucidore, as he was taken to an interrogation room to be grilled by assistant district attorney Marlene Besterman.

The Videotaped Interrogation

Besterman was the assistant district attorney assigned to the Travers investigation. Following the questioning by police,

Besterman interrogated Tom Lucidore; this interrogation was videotaped. (A-52).

The videotape clearly shows that Tom was highly intoxicated and extremely fatigued, slurring his speech, nodding his head, and at times nearly falling asleep. *See* Videotape of Besterman-Lucidore Interview. At the outset, Tom repeated the same set of facts that he had described in his written statement. (A-56-58). However, this story did not satisfy Besterman, who repeatedly accused Tom Lucidore of lying. *See, e.g.,* A-58.

As discussed in much greater detail in the argument below, Besterman presented Tom with a version of the facts which contradicted both the accounts that Travers had given police and, in doing so, caused Tom to question the accuracy of his memory in light of the massive amount of alcohol that he had consumed on the night in question. Having thus broken Tom down to the point where he did not know what to believe had happened, Besterman then badgered Tom into agreeing with her version of events. This version of events was not consistent with the stories that Travers had told, but rather described an evening of sexual crimes including rape. (A-58-87); compare to A-89-91 and A-92-93.

All through this interrogation, Tom is barely coherent, speaking with the deliberate slowness of the experienced alcoholic. He protests to Besterman's version, as it does not match his recollection, but ultimately breaks down and reluctantly agrees that the prosecutor's version of events must be true. (A-58-87).

Megan Travers did testify before a grand jury, but the transcript of that testimony has never been available to Mr. Lucidore, nor to the lower courts that have reviewed this case. As such, the videotaped interrogation constitutes the centerpiece of the prosecution that led to Tom Lucidore's guilty plea.

Arraignment, Discovery, Suppression Hearings and Plea

The following day, March 19, 1993, Tom Lucidore was arraigned in New York County Criminal Court on six counts of

Sodomy in the First Degree, Penal Law §130.50(1), two counts of Rape in the First Degree, Penal Law §130.35(1), one count of Kidnaping in the Second Degree, Penal Law §135.20, two counts of Sexual Abuse in the First Degree, Penal Law §130.65(1), and one count of Unlawful Imprisonment in the First Degree, Penal Law §135.10, and was subsequently indicted on a different set of charges: three counts of Sodomy in the First Degree, instead of six, two counts of Rape in the First Degree, one count of Kidnaping in the Second Degree, eight, rather than two, counts of Sexual Abuse in the First Degree, and one count of Unlawful Imprisonment in the First Degree. On March 23, 1993, Mr. Lucidore was arraigned on the indictment in Supreme Court, New York County and pleaded not guilty. *See* Affirmation of Maxine Rosenthal dated June 10, 1998, ¶¶ 10-11.

The prosecution provided a Voluntary Disclosure Form (VDF) to Mr. Lucidore at his arraignment which indicated that the prosecution was not aware of any *Brady* material. (A-148). In May of 1993, defense counsel specifically requested, as part of an omnibus motion, all *Brady* materials and all reports from any police department, including those outside of New York City, that had had contact with the complainant. (A-149). The prosecution replied to this motion by stating that the defendant had been provided with all of the discovery to which he was entitled in the VDF. (A-149). Defense counsel filed a reply arguing that it was clear that the prosecution had not provided the statutory discovery (e.g., medical records, photographs, etc.), and *Brady* material as required by law. (A-149). The state trial court's decision on the motion neglected to address these issues. (A-150).

It was not until September 8, 1993 that the prosecution turned over hospital records relating to the complainant's treatment at Good Samaritan Hospital. (A-142-147, 150). These reports were devoid of any mention of bruises to the complainant's wrists or back. They further indicate that a pelvic examination was performed and that the results of the examination were "normal." The records also indicated tenderness of the breasts that would have been consistent with Mr. Lucidore's recollection of consensual foreplay. (A-96).

The suppression hearing concerning the statement taken by Besterman commenced on January 27, 1994, and the prosecution for the first time disclosed a medical report prepared by a Dr. Ibrahim, describing injuries he purportedly observed on Ms. Travers' wrists, back and pubic area. (A-136, 150). On February 24, 1994, after the trial court denied suppression of the statements, Mr. Lucidore pleaded guilty to one count of Sodomy in the First Degree to cover the indictment in exchange for a promised sentence of three to nine years in prison. (A-151).

A Civil Action

On April 12, 1994, Tom Lucidore was sentenced to three to nine years incarceration. He did not bring a direct appeal in state court. While Tom was in prison, Megan Travers commenced a civil lawsuit against Tom and the Omni-Berkshire Hotel. (A-164-165).

This civil action was the major turning point in the progress of this case. The availability of civil discovery made Tom aware of various materials that had been illegally withheld by the prosecution, including the Clarkstown Report. However, it took several years and a substantial amount of legal process for Mr. Lucidore to obtain a copy of that report.

On April 20, 1995 and on May 30, 1995, Mr. Lucidore requested by letters to Detective Sergeant Janice Rogan all records relating to the complaint filed by Ms. Travers. Having received no response to this Freedom of Information Law (FOIL) request, by letter dated July 5, 1995, Mr. Lucidore requested that Clarkstown Police Chief William Collins provide all previously requested materials. On August 1, 1995, Mr. Lucidore received a copy of the Clarkstown Police Department's New York State Incident Report Number 4961-93. (A-165).

This Incident Report contained a reference to "case file #28-93," an item that was not included in the August 1, 1995 response to Mr. Lucidore's FOIL request. Thus, by certified letter to Janice Rogan dated August 8, 1995, Mr. Lucidore requested a copy of case file #28-93 but received no response.

On September 7, 1995, Mr. Lucidore sent a certified letter to Chief Collins requesting case file #28-93 and also received no response. (A-165-166).

On November 2, 1995, Mr. Lucidore filed a petition pursuant to Article 78 of the New York Civil Practice Law and Rules. By Decision and Order dated January 18, 1996, Hon. Robert R. Meehan, J.S.C. denied Mr. Lucidore's application because no proof had been submitted that the respondents had been served. On March 19, 1996, Mr. Lucidore refiled the petition, and on April 16, 1996, Justice Meehan ordered the respondents to provide Mr. Lucidore with copies of the requested records. (A-166-167).

Finally, on or about May 20, 1996, Mr. Lucidore received a complete copy of the Clarkstown Police Department Incident Report and Supplemental Complaint Record. Mr. Lucidore then requested leave of the Appellate Division, First Department to file a late notice of appeal. The motion was opposed by the Manhattan District Attorney's Office, and the court denied leave. (A-167).

By letter dated July 2, 1996, Mr. Lucidore requested that the Clarkstown Police Department provide any notes, tapes, photos and other materials that had not been provided pursuant to the Court's order. By undated letter postmarked July 17, 1996, a Police Officer D. Mullen informed Mr. Lucidore that the policy of the Clarkstown Police was to reuse tapes after thirty days and that Detective Sergeant Rogan had retired from the police force and the he was unable to contact her regarding her "personnel [sic]" notes. The Clarkstown Police never provided Mr. Lucidore with any additional material pursuant to Justice Meehan's order, despite additional requests. (A-168).

By letter dated October 28, 1996, Myron Beldock, Esq., Mr. Lucidore's attorney in the civil action, requested production of records by the New York City and the Clarkstown Police Departments, and by the New York County District Attorney. On November 4, 1996, Detective S.J. Cole-Hatchard of the Clarkstown Police provided Mr. Beldock with the Clarkstown Incident Report along with other materials that had not been

provided to Mr. Lucidore despite Justice Meehan's order. (A-169).

By letter dated September 16, 1996, Mr. Lucidore made a FOIL request to the New York County District Attorney's Office. By letter dated September 24, 1996, an ADA Patricia Bailey informed Mr. Lucidore that "the relevant case files must be reviewed in order to rule upon" Mr. Lucidore's request. By letter dated October 14, 1996, Mr. Lucidore reminded ADA Bailey of her legal duty to provide a decision, and by letter dated October 23, 1996, ADA Bailey stated that if the pertinent files could not be located by November 30, 1996, she would deny the request. By letter dated November 5, 1996, Mr. Lucidore reminded ADA Bailey of the impending deadline but received no response to this letter. (A-170).

On December 5, 1996, the District Attorney's Office submitted papers in opposition to a motion for discovery in the civil action. The grounds for opposition were that the requested information was "likely privileged, mostly privileged, mostly subject to privilege, and subject to privilege." On January 3, 1997, Mr. Lucidore wrote Robert Morgenthau, District Attorney of New York County, noting that since his office was able to form an opinion on the files regarding the motion in the civil case, the files must have been found and that ADA Bailey's reason for denying the FOIL request was no longer valid. Morgenthau did not reply to this letter. (A-170).

On February 18, 1997, Mr. Lucidore filed another Article 78 petition, seeking release of the New York County District Attorney's Office records. This petition was returned due to the lack of a notary seal, despite an affidavit indicating that a notary was not available to Mr. Lucidore in prison. (A-170-171).

Finally, in March of 1997, Mr. Beldock was given access to the NYPD records as part of discovery in the civil action. Mr. Beldock found the Case Index file, which listed the Clarkstown Report as Item C. (A-171).

Release from Prison

Tom Lucidore had his initial parole hearing in February of 1997. He provided the parole board with a four-page written statement and over five hundred pages of information, including the Clarkstown Report and Travers' deposition transcript from the civil case. (A-171).

While the parole board initially denied his request for parole, on the same day the board reversed its decision due to further examination of the file. The following month, the board granted parole, and on August 7, 1997, Mr. Lucidore was released from prison. He resided at the men's homeless shelter on Ward's Island until January 5, 1998, and during this time, he sought counsel to assist him in pursuing collateral relief. In October of 1997, Gary Farrell, Esq., agreed to take Tom's case on a pro bono basis and began to prepare a motion pursuant to section 440.10 of the New York Criminal Procedure Law. (A-171).

PRIOR PROCEEDINGS

On April 9, 1998, Mr. Lucidore filed a Notice of Motion to Vacate Judgment Under CPL§440.10 in Supreme Court, New York County. By decision dated September 30, 1998, Hon. Bruce Allen, J.S.C., denied the motion on the basis that "there is no reasonable possibility that the *Brady* material would have altered the outcome of the case." (A-50). On December 22, 1998, Hon. David B. Saxe, Justice of the Appellate Division, First Department, denied leave to appeal Justice Allen's decision. (A-51).

On April 22, 1999, Mr. Lucidore filed a petition for a writ of habeas corpus in the United States District Court for the Southern District of New York. (A-18). On August 3, 1999, Hon. Andrew J. Peck, U.S.M.J., dismissed the petition on the grounds that it was time-barred by the one-year statute of limitations created by the Antiterrorism and Effective Death Penalty Act of 1996. (A-13-34). The district court granted a certificate of appealability pursuant to 28 U.S.C. §2253(c)(2). (A-33-34).

An appeal to the United States Court of Appeals for the Second Circuit followed. On April 6, 2000, the Court of Appeals affirmed the order of the district court. This petition for a writ of certiorari followed.

SUMMARY OF ARGUMENT

While a technical computation of the time available for Mr. Lucidore to file his petition for a writ of habeas corpus reveals that this case is technically time-barred under the Antiterrorism Act as interpreted by the Second Circuit, equitable and constitutional concerns require that an equitable toll or other exception be made so that the district court can hear the merits of Mr. Lucidore's case. The voluminous record in this case demonstrates that Mr. Lucidore comes to this Court as a prisoner who is "actually innocent" under the standard of *Schlup v. Delo*, 513 U.S. 298 (1995), as no reasonable juror would find him guilty beyond a reasonable doubt on this record.

Mr. Lucidore is the victim of violations of the rule of *Brady v. Maryland*, 373 U.S. 83 (1963), which mandates the disclosure of exculpatory and impeachment evidence held by the prosecution or police upon request of the defendant. Despite Mr. Lucidore's request, the prosecution withheld the single most exculpatory piece of evidence in the entire case: a police report, taken a few hours after the alleged incident, in which the complaining witness tells a very different and much less incriminating story than the story that the prosecution would eventually use to secure a plea bargain from Mr. Lucidore. This police report also casts substantial doubt on the accuracy and good faith of a medical report that detailed substantial injuries to the complaining witness.

Mr. Lucidore pleaded guilty because he believed that he must have forgotten substantial portions of the events that took place at the Omni-Berkshire. He accepted that the police, complaining witness, and prosecutor were acting honestly and in good faith during the course of the investigation and prosecution. The revelation of the original police report made clear to him that he had been railroaded by an overzealous prosecutor, an unscrupulous complaining witness and that

witness' domineering brother-in-law, and that his original recollection, which contained not a scintilla of criminal conduct, was in fact accurate.

Having diligently collected evidence previously unavailable to him, Mr. Lucidore now comes to the federal courts as an "actually innocent" petitioner and asks the Court to hold that the one-year statute of limitations created by the Antiterrorism and Effective Death Penalty Act of 1996 cannot foreclose habeas relief to him under *Schlup* and its progeny.

ARGUMENT

I. OVERVIEW

Neither the state Supreme Court, the district court nor the Court of Appeals gave serious consideration to the respondent's argument that the New York County district attorney's office committed no *Brady* violation during the prosecution of Mr. Lucidore. Indeed, the Second Circuit expressed its

> surprise at the failure of the District Attorney's Office of New York County even to inquire, as part of its response to Lucidore's §2254 petition, into how the *Brady* violation underlying Lucidore's habeas petition was permitted to occur – an indifference to the underlying factual background of the case that persisted through the date of oral argument.

The Second Circuit "consider[ed] the [*Brady*] violation at issue to be serious and, based on the record before us, inexcusable." *See* A10-A11, *infra*.

Similarly, the District Court concurred with the state court's assessment that the respondent's argument that the withheld Clarkstown Report was not *Brady* material "borders on the fantastic." *See* A22, *infra*. Nonetheless, the district court and the Second Circuit both held that the time limitation of the Antiterrorism Act forecloses taking action upon the merits of Mr. Lucidore's petition.

Tom Lucidore does not deny that under the holdings of the majority of cases in the Courts of Appeals, this petition is technically time-barred. The Magistrate Judge correctly computed that after determination of the toll for state post-conviction relief, Mr. Lucidore missed the statutory deadline by 100 days. However, constitutional and equitable concerns demand that the Court create an exception, consistent with exceptions created by the Court in other areas of habeas jurisprudence, and rule that the district court should consider the merits of Mr. Lucidore's petition.

Having consulted with counsel as to the severity of the charges against him, and having considered the description of Ms. Travers' physical condition in Dr. Ibrahim's phony medical report, Mr. Lucidore decided to cut his losses and plead guilty to a single felony charge, despite his recollection of the events at the Omni-Berkshire. (A-158-159). Because his recollection of events was inconsistent with the significant bruising that the Ibrahim report described, and in light of the large amount of alcohol that he had consumed on the night in question, Mr. Lucidore began to question the accuracy of his recollection. At the time, he had no reason to question the veracity and good faith of the Ibrahim report, nor the motivations of Ms. Travers.

Having pleaded guilty and having been sentenced to three to nine years in prison, Mr. Lucidore did not begin to suspect until 1996, when he first saw the Clarkstown report, that his original recollection was, in fact, completely accurate and that the prosecutor, Dr. King and Ms. Travers had duped him into pleading guilty to a crime he did not commit. In the spring of 1997, Mr. Lucidore finally learned that the critical Clarkstown police report prepared by Detective Sergeant Rogan had been faxed to the NYPD on the very day it was prepared. The text of the Clarkstown report and the knowledge that the NYPD had had this report from the beginning of the investigation led Mr. Lucidore to suspect that something more sinister than a simple, good-faith sex crime investigation had resulted in his conviction.

Mr. Lucidore soon learned that the Clarkstown report was *Brady* material that the prosecutor was obligated to disclose. Furthermore, this report cast serious doubt on the sincerity and veracity of Ms. Travers for several reasons.

First, Ms. Travers' account to Rogan is simply inconsistent with the account that she gave to Detective Aponte of the NYPD the following day. In the Rogan version, Travers claims that once she was in the hotel room, Mr. Lucidore "started to fondle her and she told him not to. He then grabbed her hands and tied them behind her back and took a face cloth and shoved it in her mouth." (A-89-90). She told Detective Aponte that "[o]nce inside the room she uses the bathroom and then the perp use [sic] the bathroom. [Ms. Travers] had taken her coat and suit jacket off because she was feeling hot. She sat down on the bed and the perp sat down next to her and at some point was pushed back on the bed. The perp begins to take her skirt off to which she reacted in schock [sic] and scared and wouldn't move. The perp starts to take her stockings and panties off and she says "why are you doing this", with this he turns her onto her stomach and ties her hands behind her back..." (A-92-93).

Furthermore, she told Rogan that Mr. Lucidore "also attempted to touch her anally but she managed to talk him out of this." (A-90). She told Aponte that Mr. Lucidore "sticks [sic] his fingers into her vagina and anus" and that "he was trying to penetrate her vaginally and anally [with his penis]." (A-92-93). Significantly, while she claimed to Aponte that Mr. Lucidore failed to achieve penetration because "she kept moving," (A-92-93), she told Rogan that she "told him that he could do what he wanted but not intercourse," and never told Rogan that Mr. Lucidore attempted vaginal (or anal) penetration. (A-89-91).

The Rogan account was given at 11:50 a.m., less than eight hours after the conclusion of the incident, and the Aponte account was given the following day. That Travers cannot get her story straight so soon after the incident took place casts significant doubt on the veracity of her claims.

Second, the Rogan report makes clear that while Travers did not want to go forward, Dr. King forced the issue. Despite Rogan's attempt to explain to King that Travers had not been raped and that Travers would not make a good witness, "[a]t this point there was no talking to him as his mind was set." (A-90). Instead, King "did not want to hear this. He felt that the man should be prosecuted and he would handle it." (A-90).

Third, the Rogan report sheds considerable light on the fraud committed by the physician who prepared the alleged medical report that described multiple contusions on Travers' shoulders, back, wrists and pubic area. This report stands as the centerpiece of the prosecution of Mr. Lucidore, and was the major factor in his decision to plead guilty. Because this report described injuries that could not have been produced by the acts that Mr. Lucidore recalled engaging in with Travers, he began to doubt the accuracy of his recollection.

However, Rogan's report makes clear that the contusions described in that report simply did not exist. The significant omission of any mention of such contusions, in conjunction with the detailed description Rogan gave of the marks that actually did exist, that "could have been made during the course of lovemaking,"(A-90), combined with Ms. Travers' 1996 deposition testimony that the examining physician did not even examine areas described in the report, (A-140), makes it clear that this physician simply wrote the report that Dr. King told him to write. Indeed, Ms. Travers testified that she never spoke to this physician at all, but rather,

MT: I believe that Dr. King explained what happened to Dr. Ibrahim.

MB: What did Dr. King say to Dr. Ibrahim?

MT: I don't know. I didn't listen to that conversation.

(A-140-141). The fact that the medical report from Ms. Travers' visit to the Good Samaritan Hospital emergency room a few days later also makes no mention of such contusions further highlights the fraud committed in the Ibrahim report. (A-142).

The Second Circuit agreed with the findings of the district court and the state court that *Brady* material had been impermissibly withheld by the prosecution, but that in light of Mr. Lucidore's videotaped statement, he would have pleaded guilty even had he been in possession of the exculpatory material. New York Supreme Court Justice Allen opined that the videotaped statement would have had a powerful impact on a jury, and that Mr. Lucidore would have been found guilty at trial as well. In addition, the original trial judge ruled that the videotaped statement was constitutionally admissible, despite the totality of the circumstances of its procurement by ADA Besterman. These conclusions were error, as the videotape was clearly inadmissible based on the facts and circumstances of the interrogation.

When presented with an "actual innocence" argument, the Court should review all the facts and evidence available. *See* Section II, *infra*. In light of this rule, the Court should consider the voluntariness of the statement given to ADA Besterman as a central part of its review of Mr. Lucidore's "actual innocence." A review of the totality of the circumstances surrounding the statement reveals that the statement does not pass constitutional muster.

In New York, the voluntariness of an inculpatory statement must be viewed by looking at the totality of the circumstances under which it occurred. *See, e.g., People v. Engert*, 202 A.D. 2d 1023 (4th Dept. 1994). Thus, a number of circumstances may each alone be insufficient to cause a confession to be deemed involuntary, but in combination, those circumstances may have quantitative or qualitative effect. *People v. Anderson*, 42 N.Y. 2d 35 (1977). The totality of the circumstances surrounding the Lucidore-Besterman statement requires that the statement be deemed inadmissible.

On St. Patrick's Day of 1993, Tom Lucidore rose early in the morning for work. He worked all day, then celebrated St. Patrick's Day with massive consumption of alcoholic beverages. Following this binge, Mr. Lucidore met Ms. Travers for dinner and consumed more alcohol. (A-113). At 11:15 p.m., the NYPD arrested Tom Lucidore, and then questioned him for

several hours. During this time, Tom gave a written statement. In the early hours of the following morning, he was grilled for several hours by ADA Besterman, and finally gave the infamous videotaped "confession."

A viewing of the videotape of Mr. Lucidore's statement makes clear that Mr. Lucidore was highly intoxicated at the time of this interrogation. He is drowsily nodding his head and slurring his speech throughout the questioning. This level of intoxication, in conjunction with the method and manner of questioning by ADA Besterman, rises to the level of constitutional violation and mandates the exclusion of the entire confession.

In *Gladden v. Unsworth*, 396 F. 2d 373 (9th Cir. 1968), the Ninth Circuit discussed how intoxication, in conjunction with other factors, would invalidate a confession. That Court highlighted the element of police interrogation and the questioning by a deputy district attorney in that case, noting that the statements were hardly spontaneous in such circumstances. Additionally, that court rejected the argument that because no coercion was indicated by the record, the statement was voluntary. *Id.*

This case presents an essentially identical situation Given the opportunity to make a "thoroughly spontaneous," voluntary statement, Mr. Lucidore gave the police a written statement that contained no inculpatory material. Tom described a completely consensual encounter with Ms. Travers. His original statement to ADA Besterman recounts the same story. (A-57).

ADA: Besterman knew that Mr. Lucidore was highly intoxicated:

MB: Mr. Lucidore, I'm just ... if possible, could you try to look at me.

TL: Oh certainly. I'm sorry.

MB: No, I'm, no it's fine. I just wondered if if [sic], you know, if you're okay. You've got a cup of coffee and

(A-56-57). Later, she sees Mr. Lucidore nodding off again:

MB: Mr. Lucidore, if I, I can just ask you to look up for a moment?

TL: Oh, sorry.

(A-80). He begins to drift off not long afterwards:

MB: Sir, if you can look at me for a moment?

TL: Yes.

(A-81). The dry transcript, of course, cannot communicate fully the extent of Mr. Lucidore's inebriation and fatigue, but the videotape is part of the record on appeal.

In addition, Mr. Lucidore had also been highly intoxicated on the night of the incident. His recollection, refreshed by his credit card records, was that he had consumed twelve beers and two hard liquor drinks over the course of that evening. Besterman exploited Mr. Lucidore's intoxication of the night of the incident by lying to him about various events that have been established by both Mr. Lucidore and Ms. Travers to have occurred.

For example, Mr. Lucidore had a specific recollection of Ms. Travers placing her head on his shoulder, kissing him, and sucking on his fingers at O'Grady's bar. In his early statements to Besterman, he recounted these events. Despite the fact that Ms. Travers admitted during the wired dinner conversation that at least some of this had occurred, Besterman insisted to Mr. Lucidore that no such events had ever taken place.

Besterman eventually convinced Mr. Lucidore that these recollections were nothing but fantasy, despite Ms. Travers'

earlier admissions. This manipulation caused Tom to begin to question all his recollections of the evening in question, and led to Mr. Lucidore agreeing to Besterman's account of the evening in the subsequent portions of the interrogation.

That Besterman persuaded the drunken Lucidore to admit that events that actually did occur did not occur reflects on the involuntary nature of the videotaped statement. Tom Lucidore discarded his own recollection of the evening and agreed with the story that Marlene Besterman had concocted because he had been totally broken down by alcohol, fatigue, and psychological manipulation by this overzealous assistant district attorney.

Once Besterman had broken down Tom Lucidore to the point where he agreed that his actual recollection of the evening was nothing but fantasy, she extracted a "statement" from him through blatant cross-examination. The portion of the statement during which Mr. Lucidore "admits" that he "assaulted and raped" Ms. Travers stands as nothing more that a prosecutor testifying for the defendant, and the defendant "agreeing" to the prosecutor's account in a bleary-eyed, barely coherent manner. For example:

MB: Megan Travers was pushed down on the bed, tied up and then you had sex with her against her will. And that's what happened, isn't it?

TL: Yes, that's ... that's what happened. I, I ... Yes, I ... I must have done that. (sigh) (sigh) I ... I ... I must have done that [MB movement sound] No I, I'm sorry I ...

MB: No, you say "I must have done that."

(A-61). As Mr. Lucidore grapples with the manipulation of the overzealous assistant district attorney, she continues to lead:

MB: Well, I don't know what "I must have done that" means.

TL: I

MB: I mean that, is that, you know. Sir, this was not an action which took thirty seconds and might have been forgotten about. You had an erection, you did your best to put your penis inside of her. You put your fingers inside of her vagina. You put your fingers inside of her anus. You tied her up, you gagged her. You tied her up and when you got tired of hearing her say "no" and "please stop" then you gagged her. I, I mean this took maybe a course of over four hours you had her there. You remember the evening?

TL: Yes, yes, umm, yes.

MB: I just want you to be truthful here. And

TL: We (sigh) ... I (sigh) ... I believe ... no, no, no I'm sorry. I when when [sic] she was in the room ... (sigh) (sigh)

MB: What?

TL: I, I believe she did lay on the bed.

MB: Is "lay on the bed" the same as sit down on the edge of the bed?

TL: No, no. She, she did lay on the bed. She came out of the bathroom and she did lay on the bed. I, I did get beside her. I (sigh) ... I ... I believe she did take off her own dress. It is certainly...I...

(A-61-62). Ms. Besterman continues to distort reality:

MB: Megan Travers didn't do anything at all, or say anything at all which led you to believe that she wanted to have sex with you, isn't that true?

(A-62). In light of Ms. Travers' admission that she put her arms around Tom to make him believe that she was enjoying the encounter, this claim by Besterman stands as a disingenuous psychological trick to again convince Mr. Lucidore that his recollection was faulty. (A-92-93).

Mr. Lucidore would once again protest Besterman's distortions and manipulation:

> TL: ... my, my hesitancy is only because I'm trying to force myself to remember a sequence of events that happened that night. I ... at this, right now, what I told you about what happened in the bar, at Rosie O'Grady's, I can't tell you if it ... did happen or it's something I wanted to believe happen.

(A-64). He also makes clear that he had no original recollection of any wrong-doing:

> TL: When I talked to Megan for the third time I realized that I had done something horribly wrong.

(A-64). Of course, this third conversation with Travers took place some time after the NYPD had given Ms. Travers a recording device and effectively instructed her to try to garner an admission from Mr. Lucidore.

Besterman continued to lead:

> MB: Holding her against her will in that way is, uh, something as well, but, yeah, I would say rape, that is having sex with someone against their will, overcoming them with physical force, intimidation, her own fear of being hurt. That's the fear you instilled in her. You scared her, you tied her up, you overpowered her, and you did what you wanted with her. That's what happened.

(A-65). Notably, Besterman's interpretation of events, to which Mr. Lucidore drunkenly agreed, is not consistent with the versions of events that Ms. Travers had told to the Clarkstown and New York City police.

First, Ms. Travers had unequivocally stated that she was free to go at the beginning of the encounter, and chose to stay. Second, and most importantly, Ms. Travers' statements up to that point made clear that Mr. Lucidore did not do "what he wanted with her": she said that she had talked him out of having sexual intercourse with her, and that he had settled for fellatio.

In short, the method of interrogation stands as nothing more than an overzealous prosecutor putting words in the mouth of an intoxicated and confused suspect whose recollection of events, so clear and exculpatory in his written statement and his voluntary oral statement early in the interrogation, had been placed in question by the disingenuous and manipulative tactics of the prosecutor. Tom Lucidore did not spontaneously recall the inculpatory version of events; rather, this version was fabricated by an assistant district attorney looking for a conviction. At no time does he recite Besterman's story; instead, he agrees with Besterman's recitation.

In light of the massive inconsistencies between the Besterman story and the Travers statements, and in light of the inconsistency with Tom Lucidore's first two accounts, in conjunction with Mr. Lucidore's intoxicated, fatigued state, it is clear that this "confession" was anything but voluntary and lacks reliability.

As such, the Court should completely disregard the videotaped statement in its analysis of "actual innocence" in this case. What remains of the prosecution case is various inconsistent accounts by a reluctant complaining witness who simply cannot get her story straight, a witness who clearly has been unduly influenced by a domineering brother-in-law and an overzealous prosecutor.

In contrast, Mr. Lucidore has told a consistent story full of detail in both his written statement and at the outset of the videotaped statement. As Detective Sergeant Rogan noted, this case "would appear to boil down to her word against his." (A-90). In light of the acts of fraud and misconduct committed to secure a plea from Mr. Lucidore, and in light of Travers' inability to tell a credible, consistent story, the Court should find "actual innocence" in this case.

II THE "ACTUAL INNOCENCE" STANDARD

In *Bousley v. United States*, 523 U.S. 614 (1998), the Court held that in a case where the petitioner had pleaded guilty, to establish actual innocence, "petitioner must demonstrate that, in light of all the evidence, it is more likely than not that no reasonable juror would have convicted him." 523 U.S. at 623. A court must evaluate the innocence claim "in light of ... evidence tenably claimed to have been wrongfully excluded or to have become available only after the trial," *Schlup v. Delo*, 513 U.S. 298, 328 (1995). As such, the courts should evaluate all the evidence available at the time the "actual innocence" claim is presented, and evaluate the admissibility of all the evidence in light of the present record.

While the Court has not yet determined whether the "actual innocence" rule applies in cases barred by the new one-year statute of limitations created by the Antiterrorism Act of 1996, various lower court decisions have suggested that such application of the rule would be warranted. In *Miller v. Marr*, 141 F. 3d 976 (10th Cir. 1998), the Tenth Circuit opined that "[t]here may be circumstances where the limitation period at least raises serious constitutional questions and possibly renders the habeas remedy inadequate and ineffective." Citing *Schlup*, the Court noted that "Mr. Miller does not contend, for example, that a constitutional violation has resulted in the conviction of one who is actually innocent." *See also Triestman v. United States*, 124 F. 3d 361 (2nd Cir. 1997) (AEDPA denial of collateral review under §2255 would create serious Eighth Amendment questions in the case of a party claiming factual or legal innocence).

In *Triestman*, the Second Circuit pointed out that "Justice Blackmun, writing for himself, Justice Stevens, and Justice Souter, has noted the distinct possibility that the continued incarceration of an innocent person violates the Eighth Amendment, and has suggested that, for that reason, such a person must have recourse to the judicial system." *Citing Herrerra v. Collins*, 506 U.S. 390, 432 n. 2 (1993) (Blackmun, J., dissenting) *See also Robinson v. California*, 370 U.S. 660, 667 (1962) ("Even one day in prison would be a cruel and unusual punishment for the 'crime' of having the common cold."); *Pottinger v. City of Miami*, 810 F. Supp. 1551, 1565 (S.D.Fla. 1992) (person may not be convicted under the Eighth Amendment of innocent conduct). The *Triestman* Court also found "an open and significant due process question." Citing *Medina v. California*, 505 U.S. 437, 445 (1992) and *Schlup, supra*, the Court noted that "[i]t is certainly arguable, therefore, that the continued imprisonment of an actually innocent person would violate just such a fundamental principle."

Cases such as *Schlup*, and *Murray v. Carrier*, 477 U.S. 478, 496 (1986) provide prisoners with "a meaningful avenue by which to avoid a manifest injustice." *Triestman, supra*, at 379. Clearly, the same principles must apply in a case wherein an actually innocent prisoner is denied relief due to the one-year statute of limitations created by the Antiterrorism Act.

In light of the above concerns, and in light of Mr. Lucidore's "actual innocence" in this case, the Court must craft a remedy to provide Mr. Lucidore with the opportunity to have his case heard on the merits. Various possibilities exist.

One possibility would be to declare the one-year statute to be generally unconstitutional. At least one lower court opinion has taken this route. *See Rosa v. Senkowski*, 1997 WL 436484 (S.D.N.Y. 1997) *affirmed on other grounds* 148 F. 3d 134 (2nd Cir. 1998). However, this decision has apparently never been followed. *See, e.g., Rodriguez v. Artuz*, 990 F. Supp. 275 (S.D.N.Y. 1998) *affirmed* 161 F. 3d 763 (2nd Cir. 1998) and cases cited in Magistrate Judge's opinion. *See* A34-35, *infra*. In light of the longstanding principle that courts should avoid constitutional questions whenever possible, if an alternative

remedy can be crafted, the Court should decline to rule on the constitutional validity of the time limitation. *See Arnett v. Kennedy*, 416 U.S. 134 (1974).

Another, better, possibility would be to equitably toll the statute in this case. The Court has consistently "adhered to the principle that habeas corpus is, at its core, an equitable remedy." *Schlup, supra*, at 319. *Cf. Sanders v. United States*, 373 U.S. 1 (1963); *Kuhlmann v. Wilson*, 477 U.S. 436 (1986). As such, the "miscarriage of justice" exception has been held to apply to various procedural barriers to habeas review, including the rule against successive petitions. *See, e.g., Schlup, supra.*

Identical concerns drive the instant case. Having computed all the statutory tolls, Magistrate Judge Peck found that Mr. Lucidore's petition was filed exactly one hundred days late, and dismissed the petition without considering the merits of Mr. Lucidore's *Brady* claim. While the Magistrate Judge did consider the "actual innocence" argument, as discussed above, he clearly erred in holding that Mr. Lucidore had not established "actual innocence."

In light of these equitable concerns and the overwhelming evidence that no reasonable juror would find Mr. Lucidore guilty beyond a reasonable doubt on the present record, the Court should toll the one hundred days and order the Southern District to consider the merits of Mr. Lucidore's petition. In the alternative, the Court should hold that Mr. Lucidore's showing of "actual innocence" creates an absolute exception to the one-year statute and remand with the same instructions.

CONCLUSION

Based on the foregoing, Mr. Lucidore requests that the Court grant a writ of certiorari to the United States Court of Appeals for the Second Circuit in this case.

Dated: July 4, 2000
Buffalo, New York

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APPENDIX

Order of the United States Court of Appeals for the Second Circuit, Filed April 6, 2000.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, Foley Square, on the 6th day of April, two thousand.

BEFORE: Hon. José A. Cabranes
Hon. Sonia Sotomayor
Circuit Judges
Hon. David G. Trager
District Judge*

UNITED STATES COURT OF APPEALS
FILED
APR 6 2000
ROSEANN B. MacKECHNIE, CLERK
SECOND CIRCUIT

Docket No. 99-2492

THOMAS LUCIDORE,
Petitioner-Appellant,

v.

NEW YORK STATE DIVISION OF PAROLE,
Respondent-Appellee.

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* The Honorable David G. Trager, of the United States District Court for the Eastern District of New York, sitting by designation.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the Southern District of New York and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby **ORDERED, ADJUDGED, and DECREED** that the judgment of said district court be and it hereby is affirmed in accordance with the opinion of this court.

FOR THE COURT
Roseann B. MacKechnie, Clerk
By:
s/ BETH J. MEADOR
Beth J. Meador
Administrative Attorney

A TRUE COPY
Roseann B. MacKechnie, Clerk
By: (Illegible)
Deputy Clerk

Decision of the United States Court of Appeals for the Second Circuit, Decided April 6, 2000.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 1999

(Argued: March 16, 2000 Decided: APR - 6, 2000)

Docket No. 99-2492

THOMAS LUCIDORE,
Petitioner-Appellant,

v.

NEW YORK STATE DIVISION OF PAROLE,
Respondent-Appellee.

Before: CABRANES and SOTOMAYOR, *Circuit Judges,* and TRAGER, *District Judge.**

Petitioner appeals from a judgment entered by the United States District Court for the Southern District of New York (Andrew J. Peck, *Magistrate Judge*) on August 3, 1999, dismissing his petition for a writ of habeas corpus as untimely, but granting a certificate of appealability. We hold that: (1) the certificate of appealability granted in this case is valid; and (2) the one-year statute of limitations prescribed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. §2244(d), does not violate the

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* The Honorable David G. Trager, of the United States District Court for the Eastern District of New York, sitting by designation.

Suspension Clause of the Constitution, U.S. CONST. art. I, §9, cl. 2. Because petitioner cannot demonstrate that he is actually innocent, we do not reach the question of whether AEDPA's one-year statute of limitations must be read, by implication, to include an exception for petitioners who are actually innocent.

Affirmed.

GARY A. FARRELL, Brooklyn, NY
(Jason H. Sterne, *of counsel*),
for Petitioner-Appellant

MARY C. FARRINGTON, Assistant District Attorney for New York County (Robert M. Morgenthau, District Attorney for New York County, and Marc Frazier Scholl, Assistant District Attorney for New York County, *of counsel*), *for Respondent-Appellee.*

JOSÉ A. CABRANES, *Circuit Judge*:

Petitioner-appellant Thomas Lucidore appeals from a judgment entered by the United States District Court for the Southern District of New York (Andrew J. Peck, *Magistrate Judge*) on August 3, 1999.[1] The District Court dismissed Lucidore's petition for a writ of habeas corpus as untimely, but granted a certificate of appealability ("COA") to this Court. On appeal, Lucidore concedes that his petition is time-barred under the Antiterrorism and Effective Death Penalty Act of 1996

[1] On consent of the parties, District Judge John E. Sprizzo designated Magistrate Judge Peck to conduct all proceedings and order the entry of judgment in this case, pursuant to 28 U.S.C. §636(c)(1) ("Upon the consent of the parties, a full-time United States magistrate ... may conduct any or all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case, when specially designated to exercise such jurisdiction by the district court or courts he serves.").

("AEDPA"), 28 U.S.C. §2244(d)(1),[2] but argues that the one-year statute of limitations prescribed by AEDPA violates the Suspension Clause of the Constitution, U.S. CONST. art. I, §9, cl.2.[3] Alternatively, Lucidore contends that the Suspension Clause, the Eighth Amendment's prohibition on cruel and unusual punishment, the Fourteenth Amendment's Due Process Clause, and principles of equitable tolling each requires an exception to AEDPA's limitations period in cases where a defendant demonstrates "actual innocence." This claim arises out of the well-established principle that "where possible, [courts must] interpret[] congressional enactments so as to avoid raising serious constitutional questions." *Cheek v. United States*, 498 U.S. 192, 203 (1991); *see also Johnson v. Robison*, 415 U.S. 361, 366-67 (1974). That is, Lucidore contends that where

[2] Section 2244 provides in relevant part:

(d)(1) A 1-year period of limitations shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of—

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

[3] The Suspension Clause provides:

The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

AEDPA's statute of limitations operates to bar the habeas petition of a prisoner who is actually innocent, serious constitutional questions are implicated, and that AEDPA's limitations period therefore must be read to include, by implication, an exception for cases in which a prisoner is actually innocent.

Respondent New York State Division of Parole (the "State"), represented by the District Attorney's Office of New York County, in turn claims that the COA issued by the District Court was invalid and that we therefore lack jurisdiction over the instant appeal. In the alternative, the State argues that none of the stated constitutional provisions has been violated and that Lucidore's petition is time-barred.

We hold that the COA issued in this case is valid and that AEDPA's statute of limitations does not violate the Suspension Clause. Because we conclude that Lucidore has not demonstrated "actual innocence," we do not reach the question of whether the Constitution requires that we assume the existence of an "actual innocence" exception to AEDPA's limitations period.

I.

The following facts are drawn from the record on appeal and, unless otherwise stated, are undisputed.

On February 18, 1993, Lucidore met MT,[4] a business associate, for drinks and dinner in Manhattan. Shortly after midnight, MT accompanied Lucidore to his hotel room, where she used the bathroom. For the next several hours, Lucidore bound and gagged MT and the two engaged in various sexual acts, including oral sodomy. Lucidore maintains that the sexual acts were consensual;

[4] In light of New York Civil Rights Law §50-b, which provides that the identities of the victims of sex offenses be kept confidential by the state, we refer to the victim of Lucidore's crime as "MT".

MT claims that they were forced. Sometime around 4 or 5 a.m., Lucidore arranged for a car service to take MT home to Clarkstown, in Rockland County, New York. Later that morning, MT reported the incident to the Clarkstown police, who interviewed her and prepared an official report that same day (February 19, 1993). The case then was referred to the Special Victims Unit of the New York City Police Department, presumably because Manhattan was the place of the alleged crimes. MT was interviewed there on February 20, 1993. Over the next month, MT, at the direction of the New York City police, recorded several conversations with Lucidore in which he admitted, *inter alia*, that "what [he] did was horrible" and that he would "like to come up with a good apology."

On March 17, 1993, after MT met Lucidore in Manhattan for dinner and again recorded their conversation, the New York City police arrested Lucidore. At the police station, Lucidore was interrogated and made a videotaped statement in which he admitted that he had "restrain[ed]" MT and "force[d] her to have sex", and that the encounter had not been consensual. Lucidore subsequently was charged in Supreme Court, New York County, with three counts of Sodomy in the First Degree, two counts of Rape in the First Degree, Kidnaping in the Second Degree, eight counts of Sexual Abuse in the First Degree, and one count of Unlawful Imprisonment in the First Degree.

On or about March 23, 1993, the District Attorney's Office of New York County served the defendant with a Voluntary Disclosure Form indicating, *inter alia*, that they did not have any *Brady* material to be disclosed to the defendant. *See Brady v. State of Maryland*, 373 U.S. 83, 87 (1963) (holding that suppression by the prosecution of material evidence that is favorable to an accused, upon request, violates the accused's right to

due process of law). On May 10, 1993, defendant's trial counsel filed an "omnibus motion" in which he requested, *inter alia*, "all records, investigative reports, notes or memoranda of any police officers . . . who were in any way involved in this case" and "all such materials from the police department or departments of locales other than New York City who had any contact with the complainant or with any witness or potential witnesses." On June 3, 1993, Assistant District Attorney Marlene Besterman of the District Attorney's Office of New York County filed an "Affirmation in Response to Defendant's Omnibus Motion" indicating that the Voluntary Disclosure Form served on Lucidore disclosed all *Brady* material "known to exist at this time"—in other words, that there was no such material.

Following this exchange, and after the denial of Lucidore's motion to suppress the police station videotape and his other recorded statements, Lucidore pleaded guilty in February 1994 to one count of Sodomy in the First Degree. Lucidore did not timely appeal from the judgment of conviction and sentence was imposed on April 12, 1994.

On May 20, 1996, as a result of discovery in a civil case initiated by MT against both Lucidore and the hotel where the February 18, 1993 incident took place, Lucidore obtained a copy of a police report from the Clarkstown Police Department. The report indicated that MT had stated that she was subjected to a variety of abuse, but that no rape took place. The Clarkstown police report also (1) noted that MT "reluctantly" acknowledged that she could have gotten up and walked out when the abuse first started, though she was afraid to do so; (2) contained the interviewing officer's personal observation that the physical marks on MT's body "could have been made during the course of lovemaking"; and (3) indicated that MT was reluctant to

pursue a criminal complaint, out of fear that her coworkers would learn of the incident, and that she was going forth with the charges at the insistence of her brother-in-law.[5] On May 28, 1996, Lucidore sought leave from the Appellate Division of the Supreme Court to file a late Notice of Appeal, alleging that the Clarkstown police reports were *Brady* material that had not been provided to Lucidore. On July 18, 1996, the Appellate Division denied Lucidore's motion for leave to file a late notice of appeal. In April 1997, as a result of discovery in the civil case, Lucidore's attorney gained access to the New York City Police Department file on Lucidore's case, the index to which referenced the Clarkstown reports (Lucidore's Clarkstown file apparently had been forwarded to the New York City Police Department when the case was referred there).

On August 7, 1997, Lucidore was paroled. On April 9, 1998, Lucidore filed a motion to vacate his conviction, pursuant to New York Criminal Procedure Law §440.10,[6]

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[5] In addition, the Clarkstown police report indicates the investigating officer's view that MT "would not make a good witness" and that the case against Lucidore would not be "clear-cut." We list these items separately, however, because they are not among the portions of the Clarkstown report cited by the defendant as exculpatory material.

[6] Section 440.10 provides in pertinent part

> 1. At any time after the entry of a judgment, the court in which it was enterd may, upon motion of the defendant, vacate such judgment upon the ground that:
>
> . . . .
>
> (g) New evidence has been discovered since the entry of a judgment based upon a verdict of guilty after trial, which could not have been produced by the defendant at the trial even with due diligence on his part and which is of such character as to create a probability that had such evidence been received at the trial the verdict would have been more favorable to the defendant; provided that a motion based upon such ground must be made with due diligence after the discovery of such alleged new evidence.

in the Supreme Court, New York County, alleging that the prosecutor's failure to provide him with the Clarkstown police report during discovery was a violation of the rule articulated in *Brady* and its progeny. Ludicore claimed, in particular, that "[h]ad [he] known of the contents of the Clarkstown Police Report, [he] would not have pled guilty and would have exercised [his] constitutional right to stand trial."

On September 30, 1998, Justice Bruce Allen of the New York State Supreme Court denied Lucidore's §440.10 motion. Although he found that Lucidore's guilty plea did not constitute a waiver of his *Brady* claim, and that the prosecution had in fact committed a *Brady* violation, Justice Allen nevertheless concluded that there was not a "reasonable possibility" that Lucidore would not have pleaded guilty if he had possessed the Clarkstown report prior to entering his plea. On October 30, 1998, Lucidore sought leave to appeal to the Appellate Division, First Department, from Justice Allen's decision; the Appellate Division denied his request on December 22, 1998.

On April 22, 1999, Lucidore filed a habeas petition in the District Court pursuant to 28 U.S.C. §2254, again based on the prosecution's failure to supply him with the Clarkstown report. On August 3, 1999, Magistrate Judge Peck dismissed Lucidore's §2254 petition as untimely under AEDPA's one-year statute of limitations. This appeal followed.

II.

We note at the outset our surprise at the failure of the District Attorney's Office of New York County even to inquire, as part of its response to Lucidore's §2254 petition, into how the *Brady* violation underlying Lucidore's habeas petition was permitted to occur—an

indifference to the underlying factual background of the case that persisted through the date of oral argument before us. We consider the violation at issue to be serious and, based on the record before us, inexcusable. For the reasons that follow, however, we agree with the District Court that Lucidore's habeas petition must be dismissed because it is time-barred under AEDPA.

* * *

The District Court granted Lucidore's request for a certificate of appealability "because the Second Circuit has not fully addressed the issues involved in this Opinion and thus Lucidore has made a substantial showing of the denial of a constitutional right (if this Court's Opinion were found to be incorrect)." *Lucidore v. New York State Div. of Parole,* No. 99 Civ. 2936, 1999 WL 566362, at *7 (S.D.N.Y. Aug. 3, 1999). The State argues that this statement is insufficient to confer appellate jurisdiction because (1) Lucidore has not made the requisite "substantial showing of the denial of a constitutional right," 28 U.S.C. §2253(c)(2); and (2) the District Court's above-quoted statement fails to meet the requirement of 28 U.S.C. §2253(c)(3) that a certificate of appealability "shall indicate which specific issue or issues satisfy th[at] showing."[7]

The Supreme Court has held that a "substantial showing" does not compel a petitioner to demonstrate that he would prevail on the merits, but merely that the

[7] Section 2253(c) provides in relevant part:

> (2) A certificate of appealability may issue ... only if the applicant has made a substantial showing of the denial of a constitutional right.
>
> (3) The certificate of appealability ... shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

issues involved in his case "are debatable among jurists of reason; that a court *could* resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further." *Barefoot v. Estelle,* 463 U.S. 880, 893 n. 4 (1983) (internal quotation marks omitted) (emphasis and alteration in orginal); *see also Tankleff v. Senkowski,* 135 F.3d 235, 242 (2d Cir. 1998) (same); *Nelson v. Walker,* 121 F.3d 828, 832 (2d Cir. 1997) (same). Where a district court has found that one of these conditions exists, and accordingly has issued a certificate of appealability, or COA, we have held that the COA is presumptively valid and may not be challenged as improvidently granted. *See Soto v. United States,* 185 F.3d 48, 52 (2d Cir. 1999) (holding that, once issued, a COA suffices to confer jurisdiction); *Thomas v. Greiner,* 174 F.3d 260, 261 (2d Cir. 1999) (per curiam) (acknowledging a *sub silentio* Second Circuit rule permitting appellate review of procedural errors that do not rise to the level of denial of a constitutional right). In fact, in *Soto*, we specifically adopted the reasoning of the Seventh Circuit to the effect that a COA is a "screening device" or gate-keeping tool used to conserve judicial and prosecutorial resources, and that once a case has proceeded to briefing and such resources have been invested, "there is little point in scrutinizing the certificate of appealability." *Soto*, 185 F.3d at 52 (quoting *Young v. United States,* 124 F.3d 794, 799 (7th Cir. 1997)).

The State concedes that our holdings in *Soto* and *Thomas* foreclose its challenge to the COA issued in this case. Nevertheless, the State contends that the Supreme Court's decision in the pending case of *Slack v. McDaniel, cert. granted,* 68 U.S.L.W. 3261 (U.S. Oct. 18, 1999) (No. 98-6322), might effectively overturn *Soto* and *Thomas* and thereby call into doubt our jurisdiction over

Lucidore's appeal.[8] We disagree. *Slack* involves an appeal from the Ninth Circuit's denial of a petitioner's application for a certificate of probable cause (the precursor before enactment of AEDPA, to a COA). Accordingly, even if the Supreme Court were to hold, as the State suggests, that the denial of a certificate was appropriate in *Slack* because there had been no substantial showing that Slack's constitutional rights had been denied, it is not clear that such a decision would overrule the presumptive legitimacy, under *Soto*, of a certificate of appealability *that already has been issued.*

In any event, even if the Supreme Court were to articulate in *Slack* a rule that had the effect of overturning *Soto* and permitting the invalidation of certificates of appealability once issued, the COA granted in the instant case would survive. As noted above, the "substantial showing" requirement for issuance of a COA is satisfied if the issues involved in a petition are debatable among jurists of reason, could be resolved in a differnet manner, or are adequate to deserve encouragement to proceed further. *See Barefoot*, 463 U.S. at 893 n.4. Here, the issues involved in Lucidore's habeas petition—*i.e.* whether AEDPA's statute of limitations violates the Suspension Clause and

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[8] *Slack* concerns the question of whether, in cases where a habeas corpus petition is dismissed on exhaustion grounds, a petition filed after exhaustion that contains claims not raised in the first petition is a "second or successive" habeas corpus application. *See* 119 S. Ct. 1025 (1999). The District Court in *Slack* ruled that the petition in question was successive, *see* Brief for Petitioner, 1999 WL 297747, at *8, *Slack* (No. 98-6322), and the Ninth Circuit refused to grant petitioner a COA, *see id.* The Supreme Court granted certiorari and, after hearing oral argument, issued an order directing rebriefing on two issues: (1) whether AEDPA applied to the proceedings and (2) if so, whether a COA could have been issued under §2253. *See* 120 S. Ct. 390 (1999).

whether, in order to survive a constitutional challenge, AEDPA must be read to include an "actual innocence" exception—are "debatable among jurists of reason" as well as "adequate to deserve encouragement to proceed further." Notably, in *Triestman v. United States,* 124 F.3d 361, 378-79 (2d Cir. 1997), we observed, without deciding the issue, that denial under AEDPA of collateral review to a party claiming actual innocence could raise serious Eighth Amendment and due process questions. Similarly, in *Miller v. Marr,* 141 F.3d 976, 978 (10th Cir. 1998), the Tenth Circuit suggested that where a constitutional violation results in the conviction of someone who is actually innocent, AEDPA's limitations period might raise serious constitutional questions. In *In re Dorsainvil,* 119 F.3d 245, 248 (3d Cir. 1997), moreover, the Third Circuit noted that "[w]ere no other avenue of judicial review available for a party who claims that s/he is factually or legally innocent as a result of a previously unavailable statutory interpretation, we would be faced with a thorny constitutional issue." In citing these cases, we do not suggest, in any way, that a specter of unconstitutionality necessarily is haunting AEDPA's statute of limitations—merely that this is an important question that the courts have not yet addressed, much less resolved, and that given the unsettled nature of these issues, the certificate of appealability issued in this case was justified.

III.

As Lucidore himself concedes, even under the most generous construction of 28 U.S.C. §2244(d)(1), his one-year limitations period began to run on April 30, 1997, the date by which he both possessed the Clarkstown police report and had reason to believe that the New York City Police Department and the prosecution had

possessed it at the time the prosecution filled out the Voluntary Disclosure Form and responded to Lucidore's "omnibus" discovery request.[9] Inasmuch as Lucidore's filed his habeas petition on April 22, 1999, more than one year later, it was untimely under AEDPA.

Lucidore nevertheless challenges the dismissal of his habeas petition on the grounds that AEDPA's one-year limitations period is a *per se* violation of the Suspension Clause. We are unpersuaded by this facial challenge to AEDPA's statute of limitations. We settled this question in *Rodriguez v. Artuz*, 161 F.3d 763, 764 (2d Cir. 1998) (per curiam), *aff'g on opinion below* 990 F.Supp. 275 (S.D.N.Y. 1998), in which we adopted the District Court's reasoning that because AEDPA's one-year statute of limitations leaves habeas petitioners with some reasonable opportunity to have their claims heard on the merits, the limitations period does not render the habeas remedy "inadequate or ineffective to test the legality of detention" and therefore does not *per se* constitute an unconstitutional suspension of the writ of habeas corpus. 990 F.Supp. at 280-82 (citing *Swain v. Pressley*, 430 U.S. 372 (1977)).

Lucidore also contends that in order to survive various constitutional challenges, AEDPA's limitations period must be read to include, by implication, an exception for cases in which a petitioner is actually innocent. In evaluating this claim, we are mindful of the longstanding principle of constitutional interpretation that courts may not pass upon the validity of a federal statute "at the instance of one who fails to show that he

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[9] We note that the New York State Supreme Court, in adjudicating Lucidore's §440.10 motion, found that the Clarkstown police report "was in the prosecution's possession, was specifically requested by the defense, and was not turned over to the defense." *See Lucidore*, 1999 WL 566362, at *3. The State has not contested these findings in this habeas action.

is injured by the statute's operation." *New York City Transit Auth. v. Beazer,* 440 U.S. 568, 583 n.22 (1979) (quoting *Rescue Army v. Municipal Court,* 331 U.S. 549, 569 & n.31 (1947) (quoting *Ashwander v. TVA,* 297 U.S. 288, 346 (1936) (Brandeis, J., concurring))). Thus, unless Lucidore can demonstrate that he is actually innocent of the charges to which he pleaded guilty, we need not reach the question of whether the Constitution requires an "actual innocence" exception to AEDPA's statute of limitations.

In order to demonstrate actual innocence in a so-called collateral proceeding, a petitioner must present "new reliable evidence that was not presented at trial" and "show that it is more likely than not that no reasonable juror would have found [him] guilty beyond a reasonable doubt." *Schlup v. Delo,* 513 U.S. 298, 299, 327-28 (1993). Where the defendant pleaded guilty (as in the instant case), and therefore did not have the evidence in his case evaluated by a jury, the standard nevertheless remains the same—*i.e.*, the petitioner still must show that, "in light of all the evidence, it is more likely than not that no reasonable juror would have convicted him." *Bousley v. United States,* 523 U.S. 614, 623 (1998) (internal quotation marks omitted); *see also Rosario v. United States,* 164 F.3d 729, 733 (2d Cir. 1998) (applying actual innocence standard of reasonable juror to guilty plea, citing *Bousley*), *cert. denied,* 119 S. Ct. 2355 (1999).

In this case, Lucidore himself admitted, in his statement to the New York City police, the sodomy to which he pleaded guilty. In addition, while it is true that the Clarkstown police report—the new evidence on which Lucidore bases his actual innocence claim—contains the victim's statement that no "rape" occurred, it also reflects her statement that Lucidore sodomized her.

Further, Lucidore made several inculpatory statements in his recorded conversations with the victim (*e.g.*, "what I did was horrible" and "I feel a combination of shame, guilt and puzzlement"). In light of this evidence, the District Court properly concluded that Lucidore failed to show that it was "more likely than not that no reasonable juror would have found [him] guilty [of sodomy] beyond a reasonable doubt." Because we agree with the District Court hat Lucidore thus failed to demonstrate actual innocence, we do not reach the question of whether the Suspension Clause of the Constitution requires that we read an "actual innocence" exception into AEDPA's statute of limitations.

IV.

For the reasons stated above, the judgment of the District Court is affirmed.

Opinion and Order of the United States District Court for the Southern District of New York, Dated August 3, 1999.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

99 Civ. 2936 (AJP)

THOMAS LUCIDORE,

Petitioner,

- against -

NEW YORK STATE DIVISION OF PAROLE,

Respondent.

OPINION AND ORDER

ANDREW J. PECK, United States Magistrate Judge:

Petitioner Thomas Lucidore, represented by counsel, seeks a writ of habeas corpus from his April 12, 1994 conviction, by his guilty plea, in Supreme Court, New York County, of first degree sodomy. (*See* Petition ¶¶1-5; Affidavit of Lucidore's counsel Gary Farrell, ¶11.) Lucidore's petition, filed on April 22, 1999 (Dkt. No. 1: Petition), raises two habeas grounds: (1) his "conviction was obtained by the unconstitutional failure of the prosecution to disclose evidence favorable to the defendant" in violation of *Brady v. Maryland* (Pet. ¶12(A)), and (2) Lucidore's guilty plea was "unlawfully induced" (Pet. ¶12(B)).

The parties have consented to decision of the petition by a Magistrate Judge pursuant to 28 U.S.C. §636(c).

For the reasons set forth below, the Court dismisses Lucidore's petition as barred by the one-year statute of limitations imposed by the Antiterrorism and Effective Death Penalty Act ("AEDPA").

PROCEDURAL BACKGROUND

Lucidore's Guilty Plea and Sentence

Lucidore was arrested on March 17, 1993 for the rape (and related charges) of a business acquaintance on the night of February 18-19, 1993. (*See* Farrell Aff. ¶3; Affidavit of ADA Mary Farrington, ¶¶4-5.) According to the State, the victim recorded two conversations with Lucidore on March 4 and 17, 1993 in which he admitted to and apologized for the rape, and than confessed to the police and in a videotaped statement to an Assistant District Attorney. (Farrington Aff. ¶4-5.) In contrast, Lucidore's counsel states that "after being interrogated by an Assistant District Attorney for more than two hours on videotape, Mr. Lucidore ultimately acquiesced to the ADA's insistence that the sexual encounter was forcible, even though his own memory suggested that it was consensual. The petitioner also admitted to, *inter alia*, forcibly raping the complainant." (Farrell Aff. ¶3.)

The prosecution's pretrial Voluntary Disclosure Form and response to a defense discovery motion indicated that the State did not have any *Brady* material to disclose to the defense. (*See* Farrell Aff. ¶¶6-8.)

On February 22, 1994, Lucidore pleaded guilty to first degree sodomy pursuant to a negotiated plea agreement which dropped the remaining counts against him and agreed to a sentence, and on April 12, 1999, he was sentenced to three to nine years imprisonment. (Farrell Aff. ¶11; Pet. ¶¶1-5; Farrington Aff. ¶5.) Lucidore did not timely appeal from his conviction. (Farrington Aff. ¶5.)

Lucidore Obtains The Complainant's Exculpatory Statement to the Clarkstown Police

On May 20, 1996, as a result of discovery in a civil case by the complainant against Lucidore and the hotel at which the incident had taken place, FOIL requests and an Article 78 proceeding, Lucidore obtained a copy of Clarkstown, NY Police Department incident/complaint reports in which the complainant stated that she was not raped. (Farrell Aff. ¶¶13-14 & Ex. C; *see generally* Lucidore 7/19/99 Aff. ¶¶4-21, 23-40.)

On May 28, 1996, Lucidore sought leave from the First Department to file a late Notice of Appeal, alleging that the Clarkstown police reports were *Brady* material that the prosecution had not provided to Lucidore. (Farrington Aff. ¶6 & Ex. A: 5/28/96 Lucidore Notice of Motion to 1st Dep't; *see also* Lucidore 7/19/99 Aff. ¶22.) On July 18, 1996, the First Department denied Lucidore's motion for leave to file a late notice of appeal. (Farrell Aff. ¶15 & Ex. D: 7/18/96 1st Dep't Order.)

In April 1997, as a result of a discovery order in the related civil case, Lucidore's counsel was allowed to examine the New York City police department file on Lucidore's case, the index to which listed the Clarkstown police reports. (Farrell aff. ¶16; *see also* Lucidore 7/19/99 Aff. ¶40.)

On August 7, 1997, Lucidore was paroled and he remains under parole supervision. (Farrell Aff. ¶17; Lucidore 7/19/99 Aff. ¶¶41-42.)

Lucidore's CPL §440.10 Motion

On April 9, 1998, Lucidore—represneted by his current counsel, Mr. Farrell—filed a motion to vacate his conviction pursuant to CPL §440.10 in Supreme Court,

New York County, Alleging a *Brady* violation. (Farrell Aff. ¶¶ 18-19; Farrington Aff. ¶7; Lucidore §440.10 motion papers.) Farrell agreed to represent Lucidore on a pro bono basis in October 1997, and it "took [Farrell] approximately six months to review the voluminous materials in this case and to prepare the CPL §440.10 motion in this case." (Farrell 7/21/99 Reply Aff. ¶6; *see also* Lucidore 7/19/99 Aff. ¶42.)

As part of the CPL §440.10 motion, Lucidore and his trial counsel submitted affidavits swearing that the prosecutor had not provided the Clarkstown police reports in discovery. (Farrell Aff. ¶18; Lucidore §440.10 motion papers: 4/6/98 Lucidore Aff. ¶15, 3/11/98 Beldock Aff. ¶¶4-5, 12-13, 15.) Lucidore also stated that "[h]ad [he] known of the contents of the Clarkstown Police Report, [he] would not have pled guilty and would have exercised [his] constitutional right to stand trial." (4/6/98 Lucidore Aff. ¶15; *see also* 3/11/98 Beldock Aff. ¶15.)

After a hearing, Justice Bruce Allen of State Supreme Court denied Lucidore's §440.10 motion on September 30, 1998. (Farrell Aff. ¶21 & Ex. A: 9/30/98 Allen Opinion; Farrington Aff. ¶7.) Justice Allen held that Lucidore's guilty plea did not waive the *Brady* claim:

> The circumstances here preclude a finding of waiver. In a typical case, one can assume that the defendant in question is fully aware of his own conduct, and thus one can assume that the plea allocution is based on the defendant's personal knowledge.... Here, it is undisputed that the defendant had been drinking on the night in question ... [and] he was not fully able to recall the incident.... Given this claimed lack of memory, it cannot be presumed that the defendant's allocution was based entirely on personal knowledge of his own conduct rather than on the evidence proffereed by

> [the victim] and the People. In such a case, the plea cannot be considered "knowing" if significant *Brady* material were withheld.

(Farrell Aff. Ex. A: 9/30/98 Allen Opinion at 3-4.) Justice Allen also found that the Clarkstown police report was in the prosecution's possession, was specifically requested by the defense, and was not turned over to the defense. (*Id.* at 4.) Justice Allen also found the police report to be *Brady* material:

> The People contend that the report is not *Brady* material at all because [the complainant] did tell the Clarkstown police officer that the defendant had sodomized her, the crime for which he was convicted. . . .
>
> Since two of the counts in the indictment were for Rape in the First Degree, any evidence showing that [the complainant] had confirmed that no rape had taken place was clearly exculpatory; the People's argument that it was not borders on the fantastic. . . . [Moreover,] evidence that no rape had in fact occurred could cast doubt on the overall voluntariness and reliability of [Lucidore's] other admissions.

(*Id.* at 5.)

Justice Allen nevertheless found that the there was not a "reasonable possibility" that Lucidore would not have pleaded guilty if he had the Clarkstown police report. (*Id.* at 7-13.) Justice Allen explained that Lucidore was charged with fifteen counts and the plea bargain sentence of 3-9 years was less than Lucidore would have received if found guilty of even one of the six B felonies charged. (*Id.* at 9.) According to Justice Allen, the case was not a close one, or a "he said-she said" case, because of "the series of incredibly damaging

statements by the defendant himself." (*Id.* at 9-10.)[1] "Given the overwhelmingly powerful impact that the defendant's own recorded statements would almost certainly have had on any jury, [Justice Allen] conclude[d] that there is no reasonable possibility that the defendant would have risked a trial rather than accepting the offered plea bargain." (*Id.* at 13.) He therefore denied Lucidore's §440.10 motion. (*Id.* at 15.)

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[1] Justice Allen expounded:

> First, the jury would have heard the defendant's recorded conversation with [the victim] four weeks after the incident. It is true that, as discussed above, the defendant qualified many of his admissions by citing a lack of complete recollection. It is also possible that some of his apologies to her could be viewed as admissions of mistake rather than admissions of legal guilt. However, the jury also would have heard the defendant characterize his actions that night as "horrible," "inexplicable," and "scary." They would have heard him make statements in which he admitted all the physical acts charged in the sodomy counts, admitted that he tied, gagged, and inflicted pain upon her, admitted that he was not given any specific consent by her for these acts, admitted that looking back on the incident he realized that she had not in fact consented to the acts, admitted that he remembered her crying, saying "no" and "stop" and trying to resist him with her hands tied behind her back, and admitted that he remembered ignoring her crying and her fear. The defendant does not suggest that at trial he could have plausibly denied the making of those statements, or their truth.
>
> Even more significantly, the jury also would have seen the defendant's videotaped interview with the Assistant District Attorney. That tape would have delivered a veritable *coup de grace* to the defense case, with the defendant admitting, in living color, both his general culpability and his specific guilt. Over and over again, speaking in an eerie monotone, the defendant described the night in question as if he were recounting a baseball game. I have viewed this tape just as I have watched similar tapes over the years. This type of evidence invariably has an enormous effect on the jury and I have seen no tape that rivals this one.

(Id. at 10-11.)

On October 30, 1998, Lucidore sought leave to appeal to the First Department from Justice Allen's decision. (Farrell Aff. ¶22; 10/30/98 Lucidore 1st Dep't motion papers.) The First Department denied leave to appeal on December 22, 1998. (Farrell Aff. ¶22 & Ex. B: 12/22/98 1st Dep't Order; *see also* Lucidore 7/19/99 Reply Aff. ¶6.)[2]

Lucidore's Present Federal Habeas Petition

On April 22, 1999, Lucidore filed his present federal habeas petition, alleging *Brady* violation. (*See* Dkt. No. 1: Pet.)

On July 7, 1999, the parties stipulated to decision of the petition by a Magistrate Judge pursuant to 28 U.S.C. §636(c).

ANALYSIS

The State has moved to dismiss Lucidore's petition as untimely under the AEDPA's one-year statute of limitations. The Court agrees that Lucidore's petition is untimely.

I. THE AEDPA'S STATUTE OF LIMITATIONS BARS LUCIDORE'S PETITION

On April 24, 1996, President Clinton signed into law the Antiterrorism and Effective Death Penalty Act. The AEDPA instituted a one-year state of limitations for habeas corpus petitions filed after April 24, 1996:

> (d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of—

[2] There is no procedure for appealing such a denial to the New York Court of Appeals. (*See* Farrell Aff. ¶22.)

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

. . . .; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. §2244(d)(1)-(2).

Lucidore's conviction became final in 1994, thirty days after he pleaded guilty, since he did not appeal his conviction to the First Department. (Farrell Aff. ¶11; Farrington Aff. ¶5.) *See, e.g., Raynor v. Dufrain,* 28 F.Supp. 2d 896, 898 (S.D.N.Y. 1998). Because Lucidore's conviction became final in 1994, he had a full year form the Arpil 24, 1996 enactment of the AEDPA to file his habeas petition. *E.g., Ross v. Artuz,* 150 F.3d 97, 98 (2d Cir. 1998).

A. State Collateral Attacks as Tolls

While there appears to be a split of authority within the Southern District as to whether state collateral attacks toll the one-year statute of limitations under *Ross v. Artuz* for convictions that became final before April 24, 1996, the weight of authority clearly supports application of the §2244(d)(2) toll to the *Ross v. Artuz* limitations period. *See, e.g., DeVeaux v. Schriver,* 98 Civ. 7563, slip op. at 8 & n.3 (S.D.N.Y. April 29, 1999) (Peck, M.J.); *Varsos v. Portuondo,* 98 Civ. 6709, slip op. at 4 &

n.1 (S.D.N.Y. April 12, 1999) (Peck, M.J.).[3] The Court believes it likely that the Second Circuit will join the other Circuits that have addressed the issue and hold that state collateral attacks do toll the *Ross* one-year statute of limitations,[4] but this Court need not decide that question here, however, because even if collateral attacks toll the *Ross v. Artuz* one-year after April 24, 1996 limitations period, Lucidore's petition still is untimely.

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[3] *Compare, e.g., Fields v. Johnson*, 159 F.3d 914, 916 (5th Cir. 1998); *Gendron v. United States*, 154 F.3d 672 & n.3 (7th Cir. 1998), *cert. denied*, 119 S.Ct. 1758 (1999); *Hoggro v. Boone*, 150 F.3d 1223, 1226 (10th Cir. 1998); *Lovasz v. Vaughn*, 134 F.3d 146, 149 (3d Cir. 1998); *Brooks v. Greiner*, 97 Civ. 6997, 1999 WL 288787 at *2 (S.D.N.Y. May 6, 1999) (Sprizzo, D.J.); *Diaz v. Mantello*, 98 Civ. 3521, 1999 WL 258485 at *2 (S.D.N.Y. April 29, 1999) (Sprizzo, D.J.); *Duncan v. Greiner*, 97 Civ. 8754, 1999 WL 20890 at *3 (S.D.N.Y. Jan 19, 1999) (Koeltl, D.J.) (tolling provision in 28 U.S.C. §2244(d)(2) applied to petitioner whose conviction became final before the AEDPA's April 24, 1996 effective date); *Turner v. Senkowski*, No. 97-CV-653, 1998 WL 912011 at *2 (W.D.N.Y. Nov. 23, 1998) (tolling *Ross's* one year after AEDPA enactment period for state collateral review, following *Ioyner*); *Ioyner v. Vacco*, 97 Civ. 7047, 1998 WL 633664 at *2 (S.D.N.Y. Sept. 15, 1998) (Cote, D.J.) (applying collateral motion toll to one year period after AEDPA's enactment); *Davis v. Keane*, 9 F.Supp. 2d 391, 392 (S.D.N.Y. 1998) (Kaplan, D.J.) (tolling provision in §2244(d)(2) applied under *Peterson v. Demskie* "reasonable time" doctrine); *Rondon v. Artuz*, 97 Civ. 6904, 1998 WL 182424 at *2 n.2 (S.D.N.Y. April 17, 1998) (Stein, D.J.) (same); *with Cole v. Kuhlmann*, 5 F.Supp. 2d 212, 213-14 (S.D.N.Y. 1998) (Rakoff, D.J.) (tolling provision in §2244(d)(2) does not apply where the conviction became final before the AEDPA's effective date; *Cole*, however, was decided under the *Peterson v. Demskie* "reasonable time" doctrine before the 2d Cir.'s *Ross* decision).

[4] A single example should suffice to show the need for such a toll. A petitioner whose direct appeal became final on April 25, 1996 would be entitled to a toll for collateral attacks. Why should a petitioner whose direct appeal became final on April 23, 1996, one day before the AEDPA's effective date, not also be entitled to a tolling period while state collateral attacks were pending? If such a petitioner were

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Section 2244(d)(2) does not state that the AEDPA's one-year statute begins to run anew after decision on a state collateral attack; such an interpretation would allow an inmate to avoid the effect of the AEDPA's one-year state of limitations by bringing a belated state collateral attack. *See, e.g., Hamilton v. Miller,* No. 98 CV 5669, 1999 WL 438472 at *3 (E.D.N.Y. May 18, 1999); *DeVeaux v. Schriver,* slip op. at 8; *Varsos v. Portuondo,* slip op. at 4; *Smith v. McGinnis,* No. CV 98-1034, 1999 WL 312121 at *3-4 (E.D.N.Y. March 17, 1999); *Cromwell v. Keane,* 33 F.Supp. 2d 282, 285 (S.D.N.Y. 1999) (Rakoff, D.J. & Peck, M.J.). Rather, §2244(d)(2) merely excludes the time a collateral attack is under submission from the calculation of the one-year statute of limitations. *See, e.g., Flanagan v. Johnson,* 154 F.3d 196, 199 n.1 (5th Cir. 1998) ("Under the plain language of the statute, any time that passed between the time that [petitioner's] conviction became final and the time that his state application for habeas corpus was properly filed must be counted against the one year period of limitation."); *DeVeaux v. Schriver,* slip op. at 8; *Broom v.*

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not entitled to a toll, his collateral attacks might not have been ruled upon before his one year expires, but if he brings a federal habeas petition before his collateral attacks are decided by the state courts, his petition would be subject to dismissal for failure to exhaust state remedies.

The desirability of a collateral attack toll may be less for a prisoner whose direct appeals were concluded long before the AEDPA's enactment, but before the AEDPA, the prisoner had no deadline for bringing a state collateral attack. *Ross v. Artuz's* rationale for giving the prisoner a full year from the AEDPA's enactment, rather than just a "reasonable time," should also allow the prisoner a toll for any needed state collateral attacks.

In short, whether considered for an "old" or "recent" conviction, there appears to be good reason to hold that the collateral attack toll also applies during the *Ross v. Artuz* one year after AEDPA enactment time period.

Garvin, 99 Civ. 1083, 1999 WL 246753 at *1 (S.D.N.Y. April 26, 1999) ("[T]he filing of a collateral attack in the state court tolls the AEDPA statute of limiations during the period that it is pending, but it does not commence a new limitations period."); *Hamilton v. Miller*, 1999 WL 438472 at *3; *Smith v. McGinnis*, 1999 WL 312121 at *3-4; *Varsos v. Portuondo*, slip op. at 4-5; *Brooks v. Artuz*, 98 Civ. 4449, 1999 WL 138926 at *2 (S.D.N.Y. March 15, 1999) (" 'The tolling provision [in 28 U.S.C. 2244(d)(2)] does not . . . 'revive' the limitations period (*i.e.*, restart the clock at zero); it can only serve to pause a clock that has not yet fully run.' ") (quoting *Rashid v. Kuhlmann*, 991 F.Supp. 254, 259 (S.D.N.Y. 1998)); *Cowart v. Goord*, 97 Civ. 3864, 1998 WL 65985 at *2 (S.D.N.Y. Feb. 18, 1998) (Sotomayor, D.J.) ("the filing of a proper state collateral petition does serve to toll (but not start anew) the AEDPA statute of limitations"); *Hughes v. Irvin*, 967 F.Supp. 775, 778 (E.D.N.Y. 1997) (petitioner's statute of limitations period was suspended only during the period state collateral motions were pending, and began to run again, but not anew, when the state collateral motions were decided).[5]

[5] Lucidore relies on Judge Brieant's decision in *Valentine v. Senkowski*, 966 F.Supp. 239, 242 (S.D.N.Y. 1997), which held that the AEDPA one-year statute of limitations runs from completion of state post-conviction (collateral) review. With due respect for Judge Brieant, his decision is inconsistent with both the AEDPA's plain language—which talks of a toll for collateral review—and its legislative history (since such a rule would effectively eliminate the one-year period by allowing it to be started anew anytime a CPL §440.10 motion or other state collateral proceeding is filed). Based on a "Westcheck," the *Valentine* decision has not been followed by other judges in this Circuit; Judge Brieant has not cited *Valentine* in any subsequent opinion (at least those available on Westlaw); and *Valentine* has been criticized by other decisions. *See, e.g., Smith v. McGinnis*, No. CV 98-1034, 1999 WL 312121 at *3 (E.D.N.Y. March 17, 1999); *Powell v. Williams*, 981 F.Supp. 1409, 1413-14 (D.N.M. 1997). The weight of authority—indeed, every other case in this district that has addressed the issue—is to the contrary. The Court cannot follow *Valentine v. Senkowski*.

On May 28, 1996, Lucidore sought leave to file a late notice of appeal. (Farrington Aff. ¶6 & Ex. A.) The Court need not determine here if such a motion is an "application for State post-conviction. . .review" within the meaning of §2244(d)(2). *But see, e.g., United States ex rel. Jefferson v. Gilmore,* No. 98 C 3342, 1999 WL 261737 at *3 (N.D. Ill. April 19, 1999) ("This court believes the most prudent middle ground is that the time which lapses pending a decision by the Illinois Supreme Court to file the late petition for leave to appeal should not toll the statute of limitations."); *Raynor v. Dufrain,* 28 F.Supp 2d at 898 (application for leave to file late notice of appeal did not toll one-year limitations period); *United States ex rel. Freeman v. Page,* No. 97 C 4705, 1998 WL 171822 at *3 (N.D. Ill. April 10, 1998) ("motion for leave to file a late notice of appeal. . .cannot extend the [one-year] limitations period"). Assuming arguendo that such a motion can be considered, it would not restart the limitations period but would merely serve as a toll, and since the First Department denied the motion on July 28, 1996 (Farrell Aff.¶15 & Ex. B), would result in a toll of 61 days (from May 28 to July 28, 1996).

In addition, Lucidore filed his CPL §440.10 motion on April 9, 1998, it was denied on September 30, 1998, and leave to appeal was denied by the First Department on December 22, 1998. (Farrell Aff. ¶¶19, 21, 22 & Exs. A-B; Farrington Aff. ¶7.) Thus, Lucidore is entitled to a toll from April 9, 1998 to December 22, 1998, a total of 257 days.

Accordingly, Lucidore is entitled to a toll of 318 days—61 days from the motion for leave to file a late appeal and 257 days from the §440.10 application.

Lucidore's habeas petition was filed on April 22, 1999 (Dkt. No. 1: Pet.), which is 1,093 days after April 24, 1996. Clearly, even with 318 days tolled by state post-conviction and collateral attacks, Lucidore's petition is untimely by more than a year.

B. One Year From When The Factual Predicate Could Have Been Discovered

The Court, however, also must consider the applicability of 28 USC §2244(d)(1)(D), to determine whether Lucidore's habeas petition is timely under the separate test of one-year from the date the factual predicate of the claim could have been discovered through the exercise of due diligence. The "newly discovered evidence" AEDPA limitations period "runs from the date a petitioner is on notice of the facts which would support a claim, not from the date on which the petitioner has in his possession evidence to support his claim." *Youngblood v. Greiner*, 97 Civ. 3289, 1998 WL 720681 at *4 n.4 (S.D.N.Y. Oct. 13, 1998); *see also, e.g., Flanagan v. Johnson*, 154 F.3d 196, 198-99 (5th Cir. 1998) (petitioner's factual predicate that he did not know he had the right not to testify was established when he first executed an affidavit setting forth the legal and factual basis for his claim; "Section 2244(d)(1)(D) does not convey a statutory right to an extended delay, in this case more than seven years, while a habeas petitioner gathers every possible scrap of evidence that might. . .support his claim."); *DeVeaux v. Schriver*, 98 Civ. 7563, slip op. at 11-12 (S.D.N.Y. April 29, 1999) (Peck, M.J.); *Tineo v. Strack*, No. CV 98-834, 1998 WL 938950 at *3 (E.D.N.Y. Nov. 12, 1998) (petitioner's "newly discovered evidence" period began to run at trial when petitioner first knew that the "the videotape was not. . .accurately transcribed," not when he had the videotape re-transcribed eight years after his conviction).

Whether judged from the May 20, 1996 date on which Lucidore received the Clarkstown police report (Farrell Aff. ¶13; Lucidore 7/19/99 Aff. ¶21), or the April 1997 date (which, to give Lucidore the benefit, the Court will assume to be April 30, 1997) on which Lucidore discovered that the New York police department had copies of the Clarkstown police report (*see* Farrell Aff. ¶16; Lucidore 7/19/99 Aff. ¶40; State Br. at 6), Lucidore's petition still is untimely.[6]

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[6] Lucidore claims that because discovery was still ongoing in the civil case against Lucidore until March 26, 1996, "[t]here was no predicting what other documents might have been unearthed during that lengthy process." (Lucidore 7/21/99 Reply Br. at 12 & Ex. C.) This waiting for additional proof argument has been rejected by the courts. *See e.g., Flanagan v. Johnson,* 154 F.3d at 198-99; *Tineo v. Strack,* 1998 WL 938950 at *3; *Youngblood v. Greiner,* 1998 WL 720681 at *4 n.4.

Lucidore also claims that during the period from April 1997 until April 9, 1998, "the petitioner was working on his presentation to the New York State Parole Board and also engaging counsel to represent him pro bono in connection with his filing of the CPL §440.10 motion." (Lucidore 7/21/99 Reply Br. at 12; *see also* Farrell 7/21/99 Reply Aff. ¶6 ("[i]t took approximately six months to review the voluminous materials in this case and to prepare the CPL §440.10 motion in this case.").) The Court is sympathetic, but Congress in the AEDPA established a one-year time limit. Being busy with other legal matters (however important), or needing time to review the record or find an attorney, does not serve to equitably toll the limitations period. *See generally, e.g., Rhodes v. Senkowski,* 98 Civ. 2221, slip op. at 21 n.7 (S.D.N.Y. April 23, 1999) (Peck, M.J.) (citing cases); *Hood v. Galaza,* No. 98-CV-843, 1999 WL 253447 at *4 (S.D. Cal. Feb. 25, 1999) (no equitable tolling based on allegations of "delays in photocopying materials and utilizing the prison law library services, and that [petitioner] lack[ed] the legal sophistication to pursue his habeas claims"); *Armand v. Strack,* No. CV 98-6650, 1999 WL 167720 at *4 (E.D.N.Y. Feb. 19, 1999) (allegations that petitioner received poor legal advice and petitioner was unable to receive " 'full assistance' " from the library staff were insufficient to justify equitable tolling); *Giraldes v. Ramirez-Palmer,* No. C 98-2757, 1998 WL 775085 at *2 (N.D. Cal. Nov. 3, 1998) (fact that petitioner filed

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Under the AEDPA, Lucidore would be entitled to one year from April 30, 1997 to bring his habeas petition, subject also to the §2244(d)(2) toll for periods during which State collateral proceedings were pending. As discussed above, Lucidore's CPL §440.10 motion was pending for 257 days from April 9, 1998 to December 22, 1998. (*See* pages 3-6, 11-12, above.)[7]

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"three state petitions during the period he allegedly was hindered in his effort to file the federal petition" weighed against equitably tolling limitations period); *Nguyen v. Mervau*, No. C 98-2038, 1998 WL 556628 at *2 (N.D. Cal. Aug. 24, 1998) ("Petitioner's alleged lack of fluency in the English language and his alleged inability to find a jailhouse lawyer to assist him due to racial strife do not present extraordinary circumstances beyond his control meriting that the one-year limitation period be equitably tolled."); *Brooks v. Olivarez*, No. C 98-134, 1998 WL 474160 at *2 (N.D. Cal. Aug. 8, 1998) ("Congress gave prisoners one year to get to federal court after their convictions became final with a tolling period for any time state collateral review is pending. That one year gives the prisoner plenty of time to get to federal court and leaves room for the inevitable delays in mail, unpredictable lockdowns, as well as interruptions in research and writing time common in prison."); *United States v. Van Poyck*, 980 F. Supp. 1108, 1111 (C.D. Cal. Sept. 24, 1997) (equitable tolling not justified based on prison lockdowns and reduced law library access since tolling justified only where circumstances "were caused by events over which he had no control"; "Defendant has had ten months to secure transcripts, locate alleged missing pages of those transcripts, and research legal issues forming the basis for his §2255 motion on those days when the prison was not in general lockdown. Instead he has apparently been dilatory in setting aside the necessary time for the preparation of that motion, something entirely within his control."); *United States v. Maldanado*, Nos. Crim. A. 94-251-2, Civ. A. 97-4088, 1997 WL 360932 at *3 (E.D. Pa. June 26, 1997) (defendant not entitled to equitable tolling despite claim that "he does not speak English well, and had difficulty preparing his §2255 petition").

[7] Lucidore's May 28, 1996 application for leave to file a late notice of direct appeal, denied on July 28, 1996 (*see* page 3 above), was filed and determined before the April 30, 1997 "newly discovered evidence" trigger date, and so that motion does not create any additional toll period.

Lucidore's petition was brought on April 22, 1999, which is 722 days after April 30, 1997 (the presumed last date of discovery of Lucidor's *Brady* claim). A toll of 257 days means that Lucidore's petiton was filed 465 days after April 30, 1997, which is 100 days too late.

II. THE AEDPA'S ONE-YEAR STATUTE OF LIMITATIONS IS NOT UNCONSTITUTIONAL

Lucidore relies on Judge Sweet's decision in *Rosa v. Senkowski*, 97 Civ. 2468, 1997 WL 436484 (S.D.N.Y. Aug. 1, 1997), *aff'd on other grounds*, 148 F.3d 134 (2d Cir. 1998), for the proposition that application of the AEDPA's one-year statute of limitations would violate the suspension clause and thus be unconstitutional. (Lucidore 7/21/99 Reply Br. at 15-16.) In a series of scholarly opinions, then District, now Circuit, Judge Sotomayor disagreed with Judge Sweet's *Rosa* decision. *Rodriguez v. Artuz*, 990 F. Supp. 275, 277-84 (S.D.N.Y. 1998); *accord*, *Alexander v. Keane*, 991 F. Supp. 329, 334-40 (S.D.N.Y. 1998); *Albert v. Strack*, 97 Civ. 2978, 1998 WL 9382 at *4 n.3 (S.D.N.Y. Jan. 13, 1998), *rev'd on other grounds*, 173 F.3d 843 (2d Cir. 1999) (table); *Rashid v. Kuhlmann*, 991 F. Supp. 254, 260 n.3 (S.D.N.Y. 1998); *Santana v. Artuz*, 97 Civ. 3387, 1998 WL 9378 at *1 n.2 (S.D.N.Y. Jan. 13, 1998).

Notably, the Second Circuit affirmed Judge Sotomayor's opinion in *Rodriguez v. Artuz* "for substantially the reasons stated by the district court." *Rodriguez v. Artuz*, 161 F.3d 763, 764 (2d Cir. 1998).

This Court agrees with Judge Sotomayor's opinions. *See also Rhodes v. Senkowski*, 98 Civ. 2221, slip op. at 22-25 (S.D.N.Y. April 23, 1999) (Peck, M.J.); *Cromwell v. Keane*, 33 F. Supp. 2d 282, 286 (S.D.N.Y. 1999) (Rakoff, D.J. & Peck, M.J.).

Other Judges in this District also have agreed with Judge Sotomayor's conclusion. *See, e.g., Warren v. Garvin,* 97 Civ. 3243, 1999 WL 494117 at *3 n.3 (S.D.N.Y. July 13, 1999) (Patterson, D.J.); *Bunting v. Artuz,* 98 Civ. 2443, 1999 WL 476432 at *4 (S.D.N.Y. July 8, 1999) (Koeltl, D.J.); *Villanueva v. United States,* 98 Civ. 1883, 1999 WL 298629 at *1 (S.D.N.Y. May 12, 1999) (Baer, D.J.); *O'Connor v. Kuhlmann,* 97 Civ. 2914, 1998 WL 229516 at *1-2 (S.D.N.Y. May 7, 1998) (McKenna, D.J.); *Bond v. Walker,* 97 Civ. 3026, 1998 WL 229505 at *1-2 (S.D.N.Y. May 7, 1998) (McKenna, D.J.); *Lovett v. Kuhlmann,* 97 Civ. 2995, 1998 WL 209618 at *3-4 (S.D.N.Y. April 29, 1998) (Mukasey, D.J.); *Williams v. Greiner,* 97 Civ. 3886, 1998 WL 205317 at *1 n.1 (S.D.N.Y. April 27, 1998) (Chin, D.J.); *Matthews v. Artuz,* 97 Civ. 3334, 1998 WL 205310 at *2 n.1 (S.D.N.Y. April 27, 1998) (Chin, D.J.); *Mangialino v. United States,* 97 Civ. 2720, 1998 WL 182443 at *2-3 (S.D.N.Y. April 17, 1998) (Chin, D.J.); *Hunter v. Kuhlmann,* 97 Civ. 4692, 1998 WL 182441 at *2 (S.D.N.Y. April 17, 1998) (Chin, D.J.); *Terrence v. Senkowski,* 97 Civ. 3242, 1998 WL 182436 at *2 (S.D.N.Y. April 17, 1998) (Chin, D.J.); *Santana v. Kuhlmann,* 97 Civ. 3882, 1998 WL 182433 at *2 (S.D.N.Y. April 17, 1998) (Chin, D.J.); *Robertson v. Artuz,* 97 Civ. 2561, 1998 WL 182428 at *2-3 (S.D.N.Y. April 17, 1998) (Chin, D.J.); *Rodriguez v. Bennett,* 97 Civ. 5953, 1998 WL 104604 at *1 (S.D.N.Y. March 9, 1998) (Rakoff, D.J.); *Brown v. Superintendent, Elmira Correctional Facility,* 97 Civ. 3303, 1998 WL 75686 at *3-4 (S.D.N.Y. Feb. 23, 1998) (Mukasey, D.J.); *Brooks v. Artuz,* 97 Civ. 3300, 1998 WL 42567 at *3-4 (S.D.N.Y. Feb. 4, 1998) (Koeltl, D.J.); *Garcia v. New York State Dep't of Correctional Servs.,* 97 Civ. 3867, 1997 WL 681313 at *2 n.3 (S.D.N.Y. Oct. 31, 1997) (Scheindlin, D.J.); *Avincola v. Stinson,* 97 Civ. 1132, 1997 WL 681311 at *2 n.2 (S.D.N.Y. Oct. 31, 1997) (Scheindlin, D.J.);

White v. Garvin, 97 Civ. 3244, 1997 WL 626396 at *2 n.4 (S.D.N.Y. Oct. 8, 1997) (Scheindlin, D.J.); *Bvas v. Keane*, 97 Civ. 2789, 1997 WL 605106 at *2 n.2 (S.D.N.Y. Oct. 1, 1997) (Scheindlin, D.J.); *LaTorres v. Walker*, 97 Civ. 3392, 1997 WL 605105 at *2 n.3 (S.D.N.Y. Oct. 1, 1997) (Scheindlin, D.J.).

In contrast, Judge Sweet's *Rosa* decision has not been followed by any other Judges in the Circuit, so far as the Court can determine.

Thus, Lucidore's habeas petition is untimely under the AEDPA's statute of limitations, which is not unconstitutional.

III. LUCIDORE'S CLAIM OF "ACTUAL INNOCENCE" DOES NOT CHANGE THE RESULT

In a thorough and well-reasoned discussion, Judge Sotomayor addressed the issue of whether an exception to the AEDPA statute of limitations is required by the Suspension clause for "actual innocence" claims:

> If there is any core function of habeas corpus—any constitutionally required minimum below which the scope of federal habeas may not be reduced—it would be to free the innocent person unconstitutionally incarcerated. Thus, the question [of whether] the Suspension Clause require[s] that an exception for actual innocence be made to the AEDPA statute of limitations?—translates into the more basic question: Does the Suspension Clause require Congress to provide any federal habeas relief for state prisoners whatsoever?
>
> This is an extremely difficult question, implicating as it does some of the most fundamental and fiercely contested issues of constitutional law—relations among the three branches of the federal government, relations between the federal and state governments, and the

> balancing of individual liberty interest against society's need for a criminal justice system that at some point rests in its adjudication of guilt. . . . When such momentous issues are involved, particulary where, as here, no clear guidance can be found from higher courts, this Court is mindful of the longstanding maxim of judicial restraint that it is "our duty to avoid deciding constitutional questions presented unless essential to proper disposition of the case.' " Thus, the Court turns to petitioner['s] claims to see whether, assuming an "actual innocence" exception to the statute of limitations exists, he could take advantage of it to have this Court hear his petition on the merits notwithstanding it being time-barred.

Alexander v. Keane, 991 F. Supp. 329, 338 (S.D.N.Y. 1998) (citations omitted).[8]

In *Alexander*, Judge Sotomayor concluded that the petitioner had not shown "actual innocence," so that she did not need to reach a decision as to the existence of an "actual innocence" exception to the AEDPA's statute of limitations. *Id.* at 340.

Similarly, this Court will exercise judicial restraint by declining to decide this important constitutional issue unless required to do so. *Accord, e.g., Cromwell v. Keane*, 33 F. Supp. 2d at 287. Therefore, the Court will first determine whether Lucidore has demonstrated "actual innocence."

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[8] *Accord, e.g., Shin v. Walker*, No. 97 CV 7048, 1999 WL 345285 at *3 (E.D.N.Y. May 24, 1999); *Cromwell v. Keane*, 33 F. Supp. 2d 282, 286-87 (S.D.N.Y. 1999) (Rakoff, D.J. & Peck, M.J.); *Bond v. Walker*, 97 Civ. 3026, 1998 WL 229505 at *2 (S.D.N.Y. May 7, 1998) (McKenna, D.J.); *Mangialino v. United States*, 97 Civ. 2720, 1998 WL 182443 at *3 (S.D.N.Y. April 17, 1998) (Chin, D.J.); *Robertson v. Artuz*, 97 Civ. 2561, 1998 WL 182428 at *2 (S.D.N.Y. April 17, 1998) (Chin, D.J.).

Judge Sotomayor summarized the "actual innocence" standard announced by the Supreme Court in *Murray v. Carrier*, 477 U.S. 478, 106 S.Ct. 2639 (1986), and elaborated upon in *Schlup v. Delo*, 513 U.S. 298, 115 S.Ct. 851 (1995), as follows:

> Under *Schlup*, "the petitioner must show that is more likely than not that no reasonable juror wold have found petitioner guilty beyond a reasonable doubt." *Id.* at 327, 115 S. Ct. at 867. The Court emphasized that this is a question of actual innocence, and thus "the district court is not bound by the rules of admissibility that would govern at trial" but instead "must make its determination. . . 'in light of all the evidence, including that alleged to have been illegally admitted (but with due regard to any unreliablility of it) and evidence tenably claimed to have been wrongly excluded or to have become available only after the trial.' " *Id.* at 327-28, 115 S. Ct. at 867 (quoting Henry Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142, 160 (1970)).
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> The *Schlup* burden, it should be noted, is not whether no reasonable juror could find petitioner guilty, and is therefore less than the insufficiency of evidence standard of *Jackson v. Virginia*, 443 U.S. 307, 99 S. Ct. 2781 (1979). *See Schlup*, 513 U.S. at 330, 115 S. Ct. at 868. It is however, a significantly higher burden than showing prejudice, which only requires a reasonable probability that the factfinder would have reasonable doubt, and moreover is evaluated only in light of the evidence that should have properly been before the factfinder. *See id.* at 332-33, 115 S. Ct. at 870 (O'Connor, J., concurring). In order to pass through the actual innocence gateway, a petitioner's case must be "truly extraordinary." *Id.* at 327, 115 S. Ct. at 867.
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> [T]he Court notes the admonition in *Schlup* that "to be credible, [a claim of actual innocence] requires petitioner to support his allegations of constitutional

> error with new reliable evidence . . . that was not presented at trial." *Id.* at 324, 115 S. Ct. at 865; *see also id.* at 329, 115 S. Ct. at 868 ("a petitioner does not meet the threshold requirement unless he persuades the district court that, in light of the new evidence, no juror, acting reasonable, would have voted to find him guilty beyond a reasonable doubt") (emphasis added). This Court does not understand "new" evidence to be limited to evidence that was unavailable at trial, *see id.* at 328, 115 S. Ct. at 867 (court must evaluate "in light of . . . evidence tenably claimed to have been wrongly excluded or to have become available only after the trial"), but that a claim of actual innocence must at least present evidence that the original factfinder did not consider to be cognizable. *Accord Embrey v. Hershbergeer,* 131 F.3d 739, . . . 1997 WL 773359, at *3-4 (8th Cir. 1997) (en banc). Given the probabilistic standard of *Schlup,* a claim without new evidence unseen by the jury, to be successful, would put the court in the position of asserting that none of the jurors acted reasonably.

Alexander v. Keane, 991 F.Supp. at 339-40; *accord, e.g., Cromwell v. Keane,* 33 F.Supp. 2d at 287-88.[9]

Lucidore's counsel concedes that applying this standard is difficult because Lucidore pleaded guilty, and so suggests a lesser standard:

> Applying the *Schlup* standard to the instant case is somewhat problematic as the petitioner pled guilty as opposed to having gone to trial. Research has disclosed no authority for applying the *Schlup* standard to cases where the petitioner pled guilty. The petitioner respecfully submits that this court should consider whether it is more likely than not

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[9] *See also, e.g., Bousley v. United States,* 523 U.S. 614, 118 S.Ct. 1604, 1611-12 (latest Supreme Court decision of the meaning of "actual innocence").

> that the petitioner would have insisted on a trial, rather than pleading guilty, had he been provided the exculpatory material in a timely manner.

(Lucidore 7/21/99 Reply Br. at 13.)

The Court rejects Lucidore's suggestion of a lesser standard for determining actual innocence in the context of a guilty plea. Lucidor's suggestion is foreclosed by the Supreme Court's 1998 decision in *Bousley v. United States*, 523 U.S. 614, 118 S. Ct. 1604 (1998). Although the petitioner there had pleaded guilty, the Supreme Court utilized the *Schlup* actual innocence standard without modification: "To establish actual innocence, petitioner must demonstrate that, in light of all the evidence, it is more likely than not that no reasonable juror would have convicted him." *Bousley v. United States*, 118 S. Ct. at 1611 (internal quotation marks omitted)[10] *see also, e.g., United States v. Torres*, 163 F.3d 909, 912 & n.15 (5th Cir. 1999) ("We apply this 'reasonable juror' standard even though the petitioner's conviction was obtained pursuant to a guilty plea," citing *Bousley*); *Rosario v. United States*, 164 F.3d 729, 733 (2d Cir. 1998) (applies actual innocence standard of reasonable juror to guilty plea, citing *Bousley*), *cert. denied*, 119 S. Ct. 2355 (1999); *United States v. Thompson*, 158 F.3d 223, 225-26 (5th Cir. 1998) (*Bousley* actual innocence standard applies where conviction is based on guilty plea), *cert. denied*, 119 S. Ct. 1793 (1999).

In *Bousley*, the Supreme Court also held that "[i]n cases where the Government has foregone more serious charges in the course of plea bargaining, petitioner's

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[10] The Supreme Court also stated that "[i]t is important to note in this regard that 'actual innocence' means factual innocence, not mere legal insufficiency." *Id.*

showing of actual innocence must also extend to those charges." *Bousley v. United States*, 118 S. Ct. at 1612. In other words, a petitioner must show actual innocence of the charge to which the petitioner pleaded guilty *and* actual innocence of any more serious charge dropped by the government as part of the plea bargain.

Here, the Court need not reach the question of Lucidore's actual innocence of the rape charges because Lucidore cannot show actual innocence of the lesser sodomy charge to which he pleaded guilty. (Farrell Aff. ¶11; Farrington Aff. ¶5.) Lucidore himself admitted to the sodomy in his statement to the police. (*See* Farrell Aff. Ex. A: 9/30/98 Justice Allen Opinion at 10.)[11] And in the Clarkstown police reports, the complainant confirmed that no rape occurred but also stated that Lucidore had sodomized her. (*See id.* at 5; Farrell Aff. Ex. C; Clarkstown police reports.) The Court cannot say that it is more likely than not that no reasonable juror would have found Lucidore guilty beyond a reasonable doubt of sodomy, even if he had the Clarkstown reports and had decided to go to trial rather than plead guilty.

Lucidore has not shown "actual innocence."

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[11] The Court has reviewed Lucidore's handwritten statement to the police, transcripts of taped telephone and dinner conversations between Lucidore and the victim, and the transcript of and the videotape of Lucidore's statement to the prosecutor, and fully agrees with Justice Allen's description of them. Moreover, while Lucidore claims that he did not fully remember what happened and that he was lead by the prosecutor, the transcripts and videotape leave no doubt that Lucidore always remembered that the victim performed oral sex on him, or in his words, "she gave me the blow job," and that their sexual activity was not consensual. (*E.g.*, 3/18/93 transcript of Lucidore's Stmt. to Prosecutor, at p. 6, 13; *see also* Lucidore handwritten stmt. at p. 2; 3/17/93 dinner transcript at 21, 28.).

CONCLUSION

For the reasons set forth above, the Court dismisses Lucidore's federal habeas petition as barred by the AEDPA's one-year statute of limitations.

The Court grants Lucidore's request for a certificate of appealability because the Second Circuit has not fully addressed the issues involved in this Opinion and thus Lucidore has made a substantial showing of the denial of a constitutional right (if this Court's Opinion were found to be incorrect).

The Clerk of Court is to enter judgment accordingly.

SO ORDERED.

DATED: New York, New York
August 3, 1999

s/ ANDREW J. PECK
Andrew J. Peck
United States Magistrate Judge

Copies to:
Gary A. Farrell, Esq.
Nancy Farrington, Esq.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C.§2241(d)(1):

A 1-year period of limitations shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of –

> (A) the date on which the judgment became final by the conclusion of direct review of the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

Suspension Clause, U.S. Constitution, Article I, § 9:

> The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

Due Process Clause, U.S. Constitution, Amendment V:

> No person shall...be deprived of life, liberty, or property, without due process of law.

Due Process Clause, U.S. Constitution, Amendment XIV:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law.

U.S. Constitution, Amendment VIII:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.